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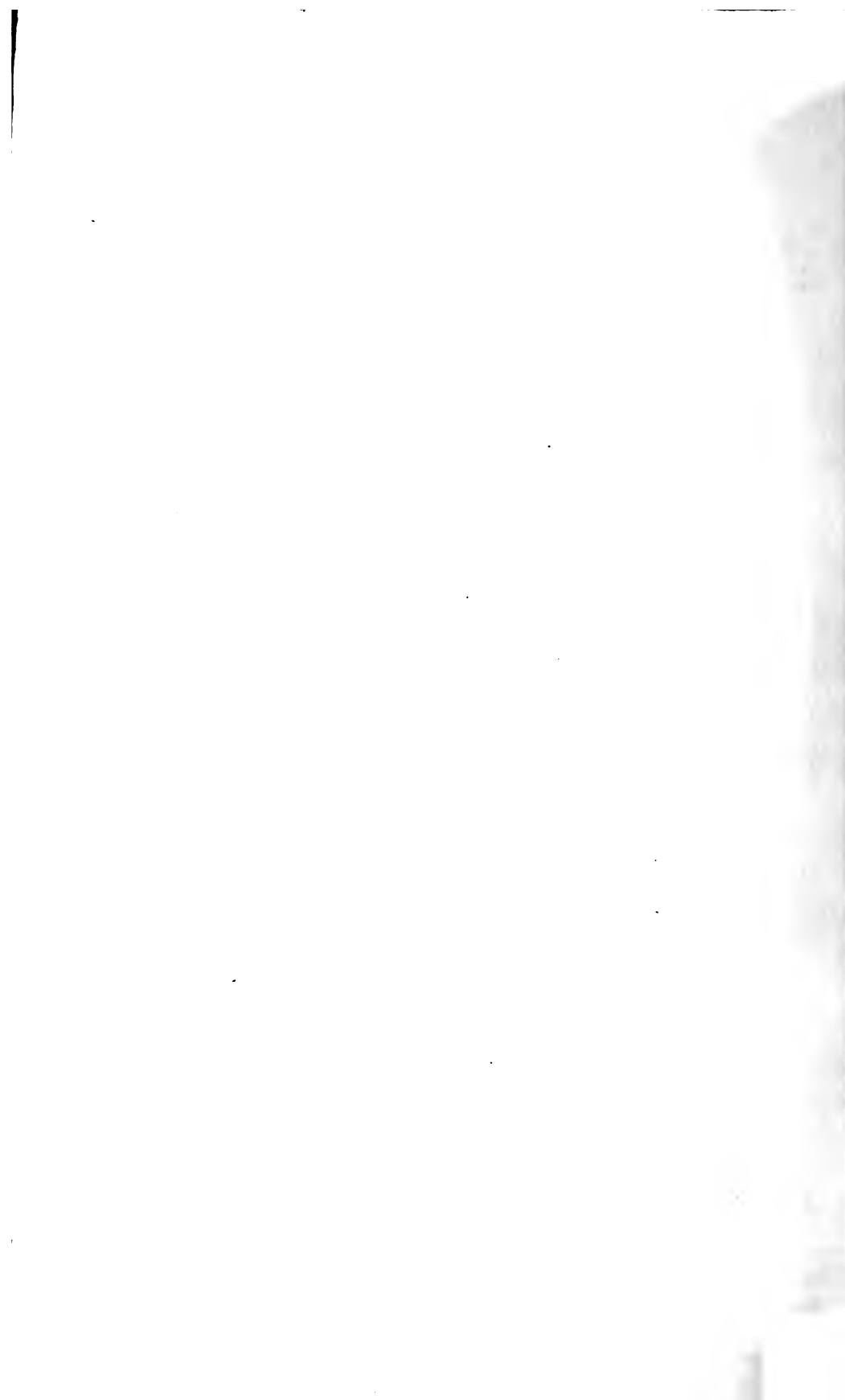
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THE

HOUSE OF LORDS CASES

ON

APPEALS AND WRITS OF ERROR,
AND CLAIMS OF PEERAGE,

DURING THE SESSIONS

1857, 1858, AND 1859.

BY CHARLES CLARK, Esq.,
OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

BY APPOINTMENT OF THE HOUSE OF LORDS.

VOL. VI.

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MEMORANDA.

IN the early part of Michaelmas Term, 1856, Sir J. Jervis, the Lord Chief Justice of the Court of Common Pleas, died.

On the 19th November, 1856, Sir A. J. E. Cockburn, her Majesty's Attorney-General, was appointed to succeed him.

Sir Richard Bethell, the Solicitor-General, was on the 22d of the same November appointed Attorney-General.

The Right Hon. J. Stuart Wortley, the Recorder of London, was on the same day appointed Solicitor-General. In Trinity Term, 1857, he resigned this office in consequence of ill health, and Henry Singer Keating, Esq., one of her Majesty's Counsel, was appointed Solicitor-General, and shortly afterwards received the honour of Knighthood.

By the 20 & 21 Vict. c. 77 (August, 1857), the Law as to Probates and Letters of Administration was altered; a new Court called the Court of Probate was created, and a Judge of that Court directed to be appointed.¹ By the 20 & 21 Vict. c. 85 (August, 1857), "the Law relating to Divorce and Matrimonial Causes" was altered.² A new Court was constituted to consist of the Lord Chancellor, the two Lords Chief Justices, the Lord Chief Baron, the Senior Puisne Judge, for the time being of each of the three Common Law Courts, and the Judge of the Court of Probate. On the 5th January, 1857, Mr. Justice Cresswell, having previously resigned the office of a Judge of the Court of Common Pleas, was appointed the Judge of the Court of Probate and Judge Ordinary of the Court of Divorce. He was also sworn in as a Privy Councillor.

In February, 1858, Lord Cranworth resigned the Great Seal, which was thereupon delivered to Sir Frederick Thesiger, one of her Majesty's Counsel, who was on the 27th February created a Peer by the title of Baron Chelmsford, of Chelmsford, in the county of Essex.

Sir R. Bethell at the same time resigned the office of Attorney-General, and Sir H. S. Keating that of Solicitor-General; the former was succeeded

¹ By the 39th section an appeal against a decree of the Court of Probate may be made to the House of Lords.

² By the 56th section an appeal in the case of a petition for the dissolution of marriage may be made to the House of Lords.

by Sir FitzRoy Kelly, and the latter by Hugh McCalmont Cairns, Esq., one of her Majesty's Counsel, who shortly after his appointment received the honour of Knighthood.

On the 9th August, 1858, the Right Hon. T. Pemberton Leigh, Chancellor and Keeper of the Great Seal to his Royal Highness the Prince of Wales, and formerly one of her Majesty's Counsel, was created a Peer by the title of Lord Kingsdown, of Kingsdown, in the county of Kent.

In Ireland, in February, 1858, Lord Chancellor Brady resigned his office, and Mr. Napier was appointed to succeed him; and at the same time Mr. Fitzgerald resigned the office of Attorney-General, and Mr. Christian that of Solicitor-General, and Mr. Whiteside and Mr. Hayes were respectively appointed their successors.

JUDGES AND LAW OFFICERS

DURING THE DECISIONS REPORTED IN THIS VOLUME.

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LORD CHELMSFORD.

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RIGHT HON. SIR A. J. E. COCKBURN.

Lord Chief Baron of the Exchequer :

RIGHT HON. SIR FREDERICK POLLOCK.

Court of Probate and Divorce Court.

Judge of the Court of Probate and Judge Ordinary.
RIGHT HON. SIR CRESSWELL CRESSWELL.

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RIGHT HON. JOSEPH NAPIER¹

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RIGHT HON. JAMES WHITESIDE.³

Solicitor-General :

J. D. FITZGERALD. JONATHAN CHRISTIAN.
EDMOND HAYES.⁴

¹ February, 1858, on the resignation of Lord Chancellor Brady.

² On Mr. Attorney-General Keogh being made a Judge of the Common Pleas.

³ February, 1858, on the resignation of Mr. Fitzgerald.

⁴ February, 1858, on the resignation of Mr. Christian.

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CASES
IN THE
HOUSE OF LORDS.

COLCLOUGH v. BOYSE.

1857. February 23.

J. T. ROSSBOROUGH COLCLOUGH and wife, *Appellants*.
JANE S. BOYSE, *Respondent*.

Will. Legal Devisee. Pleading.

A bill to establish a will against an heir at law may be maintained at the suit of a mere legal devisee not charged with any trust or duty under the will.

THE ATTORNEY-GENERAL (Sir R. Bethell), when this appeal was called on, said: I appear for the appellants, and the question involved in the case is, whether the Court of Chancery has jurisdiction to entertain a bill at the suit of a simple legal devisee of real estate, to establish a will in which there are no trusts declared by the will, and where no equitable relief is prayed nor administration of the estate sought under the direction of a Court of equity. The Vice-Chancellor Wood decided, on demurrer to the bill,¹ that such jurisdiction did exist; and, on appeal, his decision was affirmed by the unanimous opinion of the Court of Appeal, consisting of the Lord Chancellor and the two Lords Justices.² I have anxiously considered this question, which, to a great degree, was involved in the argument upon the appeal against the decree of the Court of Chancery in **Ireland*,³ and I feel myself constrained to say that I am unable to support an appeal

¹ Kay, 71.

² 3 De G., M. & G. 817.

³ See the next case.

against the decision of the Court below. I believe that the Court of Chancery has jurisdiction to entertain, at the suit of a simple legal devisee, a bill to establish a will, and also, *e converso*, a bill by an heir at law to have an issue directed for the purpose of ascertaining whether or not it is the will of the testator. Under these circumstances I must submit to have the judgment of the Court below affirmed.

Judgment of the Court below affirmed, with costs.

Lords' Journals, 23d February, 1857.

BOYSE v. ROSSBOROUGH.

1856. June 16, 17, 19; July 3, 4, 7, 10, 11, 14, 15. 1857. March 13.

JANE STRATFORD BOYSE,	<i>Appellant.</i>
JOHN T. ROSSBOROUGH and MARY GREY WENT-	}	<i>Respondents.</i>
WORTH ROSSBOROUGH, his wife,		

Will. Capacity of Testator. Heir at Law. Right to issue Ejectment. Verdict. New Trial. Alteration of Order. Influence. Equity Jurisdiction. Order against Wife to pay Debt of Husband.

In a bill filed by an heir at law to impeach a will of real estate as having been obtained by undue influence or fraud, the Court of Chancery has a discretion to direct an issue *devisavit vel non*, or merely to remove obstacles out of the way of the heir asserting his legal title. This House will not interfere with the exercise of that discretion, unless it appears that injustice has been or is likely to be its consequence.

Undue influence may exist in the form of bad companionship and bad example, and yet not be sufficient to invalidate a will made under its operation. To be within the meaning of the rule of law, so as to produce that effect, it must be an influence exercised by coercion or by fraud. But actual violence is not necessary to constitute coercion. Imaginary terrors may be sufficient for that purpose.

In order to set aside the will of a person of sound mind, it must be shown that the circumstances under which it was executed are inconsistent with any hypothesis but that of undue influence, which cannot be presumed, but * 3 must be shown to have been * exercised, and exercised in relation to the will itself, and not merely to other transactions.

Whether in a trial at law ordered by the Court of Equity, there has or has not

been misdirection, equity is not bound by one verdict; but for its better satisfaction may direct a new trial.

What is a proper direction considered.

Quere. Whether a consent to a particular form of order can be given by a married woman?

Though during her husband's life and after his death she acted under that order, she was allowed to make it one of the grounds of appeal to this House.

A suit was instituted against a married woman and her husband in respect of property devised to her. After a decree, which among other things directed an account, the Master reported a sum as due from both. An order was made on the widow to pay this sum into Court within a limited time. This sum was composed of rents received from the property in dispute before and during the marriage and after the death of the husband.

Quere. Whether such an order could be, under such circumstances, valid?

THIS was an appeal against orders and a decree made in the Court of Chancery in Ireland, in a suit instituted to determine whether a certain paper writing, dated 6th August, 1842, was the will of one Cæsar Colclough. The appellant had been the wife of the testator, but had married again. The female respondent was his heiress at law.

Mr. Colclough was born in the year 1766, and spent much of the early part of his life in France. In 1802 he came to England, but went back again to France, and on the sudden recommencement of the war was, with all the other British subjects then resident there, detained as a prisoner in France. In 1814 he returned to England. He was possessed of considerable estates in Wexford in Ireland, and visited that country, where, in November, 1818, he married Jane Stratford Kirwan, daughter of John Kirwan, Esq., one of his Majesty's Counsel. The settlement made on this marriage secured to the lady an income of 500*l.* a year. After this period it appeared that he was accustomed to spend much of his time on the Continent,* but in 1840 he purchased a [* 4 mansion at Cheltenham, called Boteler House, and there he principally resided till his death. In the summer of 1842 he was attacked with influenza, and died on the 23d of August in that year. The testator, in the month of July, 1824, made a will, giving all his real and personal property to trustees, on trust to pay debts and funeral expenses, and an annuity of 1500*l.* to his wife (provided she did not marry again), and a like annuity to his mother, "(provided she never receives into her house M. A. R., her niece, who endeavored, by most wicked means, to make mischief

in my family).” He gave the sum of 1*s.* to the Rev. David Colclough, and to Cæsar Colclough, the son of that person, 100*l.* per annum, and to his brother Agmond 50*l.* per annum, and the rest of his property he left to accumulate “until one of the male descendants of Cæsar or Agmond, or other child of one of my heirs, shall be brought up from the age of four years old to that of twenty-one, in England or Edinburgh, he then to inherit the whole.” No other will was made by the testator till, in the course of his last illness, on the 5th of August, 1842, he made one, the instructions to prepare which, it was sworn, were given only two days before. In that will he gave Boteler House to his wife and her heirs for ever; he appointed trustees, and directed them to secure an annuity of 4500*l.* to his wife for life, in addition to her annuity under the marriage settlement. This sum was to be raised from the personal, or, in case of that being deficient, from the real estate, and if, after payment of the purchase money of that annuity any surplus should remain in the hands of the trustees, they were “to pay the same to the person or persons entitled to the residue of my real estate.”

In the course of the proceedings which afterwards took place, it was stated that this will was executed twice, first on the 4th *5 and again on the 5th of August, in consequence *of the devise of Boteler House having been, by mistake, omitted from the first copy. The attesting witnesses on both occasions were James Fortnam, a surgeon at Cheltenham (the medical attendant of Mr. Colclough), and G. E. Williams, a solicitor there, by whom the will had been prepared. On the next day, however, namely, the 6th of August, 1842, Mr. Colclough, who, it was alleged, had that day told the solicitor that his wife “had always behaved well to him, and he would do what was right,” executed the following will, the validity of which was now in contest:—

“The last will and testament of me, Cæsar Colclough, of Tintern Abbey, in the county of Wexford, and of Boteler House, Cheltenham, Esquire. I give and devise all and singular my real and personal estate to my dear wife, Jane Stratford Colclough, her heirs, executors, administrators, and assigns, to and for her and their own absolute use and benefit. But as to any estate vested in me, upon trust or by way of mortgage, subject to the equities affecting the same respectively.

“I appoint the said Jane Stratford Colclough executrix of this

my will, hereby revoking every other will by me at any time heretofore made.

"In witness whereof I have to this my will set my hand, the 6th day of August, in the year of our Lord, 1842.

"CÆSAR COLCLOUGH."

<p>"Signed by the said testator, as his last will and testament, in the presence of us present at the same time, who, at his request, in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses.</p>	}	<p>"JAMES FORTNAM, Surgeon, Cheltenham. "G. E. WILLIAMS, Solicitor, Cheltenham."</p>
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* This will was, in the Ecclesiastical Courts of both Eng- * 6
land and Ireland, proved by the appellant, the testator's
widow, who entered into possession of the estates. The lands in
Wexford were stated to produce an income of nearly 7000*l.* a year,
and the personal property in England and Ireland (independently
of Boteler House) was valued at 70,000*l.*

In the year 1846 the appellant married Thomas Boyse, Esq., of
Bannow, in the county of Wexford, and settled on him certain of
the lands then held by her under the alleged will of the 6th
August, 1842.

The respondent, Mary Grey Wentworth Rossborough (who has
since assumed the name of Colclough) was the heiress at law
of Cæsar Colclough, and put in her claim to his property in that
character.

In September, 1849, the respondents filed their bill in the Court
of Chancery in Ireland against Mrs. Boyse and her husband, and
thereby alleged that the appellant had, immediately after her mar-
riage with Mr. Colclough, formed, and that she had continually
persevered in, a systematic plan to separate and estrange Mr. Col-
clough from all members of his family, and had acquired not only
undue influence, but complete command and control over Mr.
Colclough, so as to deprive him altogether of free agency over his
estates or affairs; that, in consequence thereof, Mr. Colclough was
never a free agent, but on the contrary was prevented from exer-
cising even the duties of a landlord; and that the appellant had
induced him to go to Cheltenham, in order thereby to promote the

success of the scheme which she had formed, and that she had there reduced him to a state of apprehension and dependence. The bill stated the will executed by Mr. Colclough on the 5th of August, 1842, and alleged that the appellant, finding that * 7 will not to be so favourable to her wishes as she * desired, caused another paper to be prepared by Mr. Williams, and by herself, or some other person on her behalf gave instructions to Mr. Williams for that purpose, and that the will of the 6th August, 1842, was prepared accordingly, and that the appellant represented to Mr. Colclough that the will of the 6th of August was prepared in consequence of an alleged uncertainty in the terms of the will of the 5th of August, and that she led Mr. Colclough to believe that in every other respect the will was precisely similar to that of the 5th of August; and that at the period of the execution of the will of the 6th of August, Mr. Colclough was not aware that he was thereby devising and bequeathing to his wife all his real and personal estate, but considered that he was merely confirming the terms of the will of the 5th of August; and that the will of the 6th of August was void by reason of the mental incapacity and unsoundness of mind of Mr. Colclough when he executed the same, and by reason of the undue and improper influence and control exercised over Mr. Colclough by the appellant. The bill stated the settlement made on the marriage of the appellant with her second husband, and that the respondents wished to proceed by ejectment to recover the Wexford estates, but that there were outstanding terms which would be set up as a bar to any ejectment. The bill prayed that the will of the 6th of August, 1842, might be declared void, and delivered up to be cancelled, or that an issue might be directed to try whether the freehold estates of Mr. Colclough were devised by the said will; and that if it should be found that the said estates descended on his heiress at law, that the defendants might be ordered to deliver up the title deeds relating to the estates, and to account for the rents and profits of the lands received by them, or that the plaintiffs might be at liberty to proceed at law by ejectment to * 8 recover the said estates, and that the Court might * prevent any outstanding terms being set up, and for further relief.

Witnesses were examined on both sides, and the cause came on for hearing before the Lord Chancellor of Ireland, in January, 1852, and on the 31st of January his Lordship was pleased to

order that the validity of the will of the 6th August, 1842, should be tried in an issue *devisavit vel non*, in which the appellant and her husband were to be the plaintiffs and the respondents were to be defendants. The trial of the issue came on before Mr. Baron Pennefather and a special jury of the county of Wexford, and lasted for five days, at the end of which a verdict was found for the defendants in the issue. In Michaelmas term, 1852, the appellants moved for a new trial, and in the event of its being granted prayed that the venue might be changed from Wexford to Dublin. This motion was heard before the Lord Chancellor, and on the 18th April, 1853, was refused with costs;¹ and the cause itself having been heard at the same time upon further directions, the Lord Chancellor, on the 19th April, 1853, made a decree declaring the alleged will of the 6th of August, 1842, to be null and void as a devise of the estates of Cæsar Colclough in Ireland, and directed that the sheriff of the county of Wexford should put the respondents (in right of Mrs. Rossborough as heiress at law) into possession of the said estates; and the appellants were ordered on oath to deliver up all documents relating to the same; and it was referred to the Master to take, after making all just allowances, "an account of the rents and profits received by the defendants (the appellants) or either of them, from the 7th September, 1843, being six years prior to the time of filing the bill," and the appellants were ordered to pay all costs.² On the 2d July, 1853, on the application of the appellants, a variation was made in * this order by "directing the Master * 9 to take an account of all sums received by the defendants" (the present appellants), "or either of them, for or on account of the rents and profits of the said estates, which accrued due since the 7th of September, 1843, being six years prior to the time of filing the plaintiff's bill in this cause."

On the 30th July, 1853, application was made to the Lord Chancellor by the respondents that the leading order made on the 31st January, 1852 (the order directing the issue), might be amended *nunc pro tunc*, by inserting the words, "the defendants by their counsel so consenting." Counsel were heard upon this application, and finally the Lord Chancellor ordered the following words to be inserted, "and the defendants' counsel not objecting."³

¹ 3 Irish Ch. N. S. 489 - 519.

² 3 Irish Ch. N. S. 542.

³ 3 Irish Ch. N. S. 540.

The decree and the several orders were enrolled, and the appellants presented their appeal against the order of the 31st January, 1852, directing the issue, and of the 18th April, 1853, refusing the new trial, and against the decree of the 19th April, 1853, declaring the paper writing of 6th August, 1842, null and void as a devise of the estates in the pleadings mentioned.

On the 14th January, 1854, Thomas Boyse died, and the proceedings were duly revived, and the supplemental suit proceeded in the name of the present appellant alone.

Accounts were taken under the decree, and after giving credit for all just allowances, the Master, on the 8th April, 1854, found by his report that the appellant and her late husband received, on account of the rents and profits of the said estates, since the 7th September, 1843, after giving credit for all just allowances, the sum of 21,961*l.* 19*s.* 10*d.* This sum was in part composed of rents received before and during the marriage of the appellant with Mr. Boyse, and of rents received by her since his death.

* 10 On the 17th * May, 1854, the respondents moved before the Master of the Rolls, that the appellant should be ordered to pay this sum within ten days; but on the 5th June, 1854, his Honour refused the motion with costs.¹ The respondents appealed thereon to the Lord Chancellor, who, on the 19th June, reversed the decision of the Master of the Rolls, and directed payment of the sum so found due to be made within one fortnight from that time.² This order was enrolled, and is also included in the present appeal.³

Sir F. Thesiger and *Mr. Rolt* (*Mr. Cairns* was with them) for the appellant. — The course pursued in this case in the Court below, that of granting an issue *devisavit vel non* on the demand of an heir in a suit instituted by him to impeach a will, is without justification in principle or precedent, and is contrary to the settled practice of Courts of equity. When a devisee files a bill against an heir at law for the purpose of establishing a will, the heir at law has, no doubt, a right to an issue *devisavit vel non*,

¹ 3 Irish Ch. N. S. 540.

² 3 Irish Ch. N. S. 629.

³ In discussing the question whether a new trial ought to have been granted by the Court below, the evidence and the Judge's charge were much commented on. They are quoted by the Lord Chancellor when moving the judgment of the House. See post.

for the purpose of compelling the devisee to give clear proof of the will. But when the heir at law files a bill against a devisee impeaching a will of real estate, the heir at law has no right to such an issue. If there should be such impediments to his trying his title at law as prevent him from coming into a Court of law for that purpose, the ordinary course in a Court of equity is to remove those impediments, and leave the heir to his legal remedy. If these impediments are of such a kind as to prevent the Court of Equity from effecting this purpose, if *the circum- *11 stances are such that the heir cannot have relief at law in any other way, then, but then only, it may grant him an issue.

But assuming that equity may, in the circumstances just stated, grant an issue, and supposing the verdict on that issue to be unfavourable to the will, still it is not competent to a Court of equity to declare the will void, and to put the heir at law into possession of the estate. No such jurisdiction exists in a Court of equity. If the right of the heir is fully established, it can only declare the devisee to hold as trustee for him; but to establish his right to set aside the will, he must seek the aid of the Ecclesiastical Court in reference to personal estate, and of a Court of law in reference to real estate. These are the general propositions for which the appellant contends, and they are fully borne out by the authorities. The rule as to granting an issue on the demand of an heir is thus stated in *Jones v. Jones*¹ by Sir W. Grant, Master of the Rolls: "Although there may have been instances of an issue directed on the bill of an heir at law, where no opposition has been made to that mode of proceeding, yet I apprehend that he cannot insist on any such direction. He may bring his ejectment, and if there be any impediments to the proper trial of the merits, he may come here to have them removed. But he has no right to have an issue substituted in the place of an ejectment. If he can have no issue, can he have those consequential directions that are asked only on the supposition that an issue is to be granted?" *Shewen v. Lewis*² was a case referred to in the argument there, and is reported in a note. At first sight that case appears to show that the Court can *grant an issue on the demand of the heir, but *12 as *Shewen v. Lewis* was decided by the same learned Judge who decided *Jones v. Jones*, there must have been some special circumstances which distinguished the one from the other. And

¹ 3 Mer. 161, 171. See also 7 Price, 668.

² 3 Mer. 167, n.

in *Jones v. Frost*¹ Lord Eldon expressly acted on the rule laid down by the Master of the Rolls. It is true that in *Pemberton v. Pemberton*² an issue *devisavit vel non* was directed in such a case, but the report is not complete; and from some observations made in that case it appears that that course must have been taken by consent, for in the course of the judgment there it is expressly said:³ "This bill is rather new in principle. I have no doubt, that heirs at law entitled to estates, of which their ancestors were seised, though only in equity, and therefore not having the means of proceeding at law, may come into equity merely to recover the possession of those estates, and to have deeds delivered up. I will not say, that in some cases, they may not apply to have the will delivered up as an instrument that ought not to vex their title, which however, if it retains in it any thing that has validity, ought not to be delivered up. But the course has been to file a bill, stating the reasons they cannot bring an ejectment: mortgages, outstanding terms, &c.; and in general cases this Court, as it cannot try the validity of a will, sends that to be determined by the proper tribunal, and afterwards does what is right." His Lordship then adds that the proper course is to direct the heir to bring ejectment, preventing the other party from setting up any terms, satisfied or unsatisfied, as a motion for a new trial can be better discussed in the Court of law than in the Court of Equity.

*Webb v. Claverden*⁴ seems to show that in a bill by the
* 13 * heir an issue may be directed, but that is a mistake in the report; for the entry in the register's book⁵ is that it was ordered that the bill should be retained for twelve months, and that the plaintiff should be at liberty to bring ejectment for such parts of the premises in question as were not mentioned in a lease of February, 1727; and if the plaintiff brought ejectment the defendant was not to set up any outstanding terms, &c., and further directions were reserved; but in case the plaintiff did not bring ejectment within twelve months, his bill, so far as it affected the will, was to be dismissed with costs. In that case, therefore, the heir was left to his remedy at law. In *Armitage v. Wadsworth*⁶ it was declared that but for the averment of there being outstanding terms, such a bill "would be a mere ejectment bill by

¹ Jac. 466.² 13 Ves. 297.³ 13 Ves. 290.⁴ 2 Atk. 424.⁵ Nom. *Webb v. Claverden* (October 29, 1742), Reg. Lib. B. 1742, fol. 83, G. E.⁶ 1 Madd. 189, 192.

an heir at law out of possession, praying an issue, stating no impediment to the assertion of his right at law, and therefore not sustainable." An observation made by Lord Hardwicke, in *Bennet v. Vade*,¹ that in such a case the Court of Chancery "can only direct an issue *devisavit vel non*," must be taken to be erroneous, and was clearly extra-judicial, for no such issue seems by the register's book² to have *been granted; but the prayer *14 of the bill shows, by the words "that till the plaintiff's right can be determined at law" the heir must have been proceeding contemporaneously in ejectment. In the English branch of the present case,³ which was a bill filed by the devisee to establish the

¹ 2 Atk. 324.

² *Nom. Bennett v. Vade* (28 June, 1742), Reg. Lib. A. 1741, fol. 515. The bill charged in substance that Sir John Leigh was, by the undue influence (particulars of which were fully stated) of Vade, an apothecary who attended him, induced first to marry Vade's daughter, and after her death, to make a will in Vade's favour; that Vade left it with a proctor before Sir John's death, and so got probate of it the day after his death. The plaintiffs alleged that they were proceeding in the Ecclesiastical Court to obtain a repeal of the probate, and that Vade pretended that Sir John, after his marriage with Vade's daughter, executed several deeds of settlement of his real estate in their favour, particularly certain deeds of the 9th and 10th September, 1737, which deeds, as well as the will, the plaintiffs alleged were obtained by gross abuse and imposition. The plaintiffs therefore prayed "that the defendant may answer the said matters, and that the said will and deeds may be set aside for fraud," and testimony perpetuated, &c., "and in the mean time, and till the plaintiffs' right can be determined at law, that the defendant may be restrained by injunction from committing waste, &c.," and that all the deeds may be brought into Court for safe custody, and that the defendant may be restrained from setting up any term, &c. "on the trial of the said ejectment." A cross bill was filed by Vade to establish the will. The cause was heard on both bills before the Lord Chancellor (Lord Hardwicke), who was, after argument, pleased to declare that the deeds of lease and release, dated 9th and 10th September, 1737, were procured from the said Sir John Leigh by fraud, &c., and by the undue influence obtained by the defendant, W. Vade, over the weakness of Sir John Leigh, and that the same ought to be set aside; and doth therefore think fit and so order and decree that the cross bill do stand dismissed out of this Court with costs, &c., and in the original suit doth order and decree that the said deeds be set aside and delivered up by the defendant to the plaintiffs to be cancelled; and that the defendant do by proper deeds, &c., convey the manors, &c., in question, to the plaintiff Mary, the wife of John Bennett, the heir at law of Sir John Leigh, and that the defendant do deliver up possession of the said manors, lands, &c.; and that it be referred to the Master to take accounts of the rents, &c. accrued since the death of Sir John, and of timber felled, &c. — J. S.

³ Ante, p. 1, 3 De G., M. & G. 817. See also Kay, 71, and 1 Kay & J. 124.

will, as to the property in this country, Lord Justice Turner thus declared the principle which must govern all these cases :¹ " Another argument adduced, on the part of the heir, was that if the devisee was entitled to sue the heir for the purpose of establishing the will against him, there ought to be a reciprocal right on

* 15 * the part of the heir, but that no such right exists. The position of the heir, however, is wholly different from that of the devisee. The heir derives his title from the law. He wants no declaration of this Court to give effect to his title, but the title of the devisee depends upon the act of the testator, and the declaration of this Court affirms the validity of that Act." In *Bennet v. Wade*,² though the bill by the heir was sustained, it was sustained only as to deeds, and it was distinctly declared that " a will cannot be set aside for fraud and imposition here." In *M. Gregor v. Topham*³ the estates in question were merely equitable, and consequently no action at law could be maintained. *Bates v. Graves*,⁴ where deeds and a will confirming them were set aside, and the heir was compelled to ask the interposition of a Court of equity, was a case where other questions were so mixed up with that of the validity of the will, that they could not be separated, and all were made to depend on one trial at law. The peculiar circumstances of that case prevent it from being an authority here. *Barnesly v. Powel*⁵ is subject to the same remark. In *Hopwood v. Derby*⁶ the heir at law claimed also as devisee, and therefore had the same right as an ordinary devisee to an issue of *devisavit vel non*, though the verdict on that issue might not have bound him, for he might afterwards have proceeded as heir at law to bring ejectment. All these grounds were fully considered and explained in *Tatham v. Wright*.⁷ There, though the bill prayed that the will might be declared to have been obtained by

* 16 fraud and undue influence, and to be therefore * void, it also prayed that the devisees might be restrained from setting up outstanding terms as a defence to any action at law which the heir might bring. The Master of the Rolls there said :⁸ " The bill

¹ 3 De G., M. & G. 850.

² 2 Atk. 324.

³ 3 H. L. Cas. 132. See 3 Hare, 490, n. a., where it is said that the issue was ordered without any question being raised whether that was the proper mode of proceeding.

⁴ 2 Ves. Jun. 287.

⁵ 2 Russ. & M. 1.

⁶ 1 Vez. Sen. 119. See also 286 et seq.

⁷ 2 Russ. & M. 8.

⁸ 1 Kay & J. 255.

filed in this case is not by the devisees to establish the testamentary instruments, but it is a bill by the heir at law claiming, against these instruments, to have a legal estate put out of his way that he may try their validity by ejectment, and no decree in this cause would be conclusive upon the question of the validity of the will. The plaintiff might, by redeeming the mortgage, get in the outstanding legal estate by an assignment of the mortgage; or even upon the hearing on further directions, he might still contend that he ought not to be concluded by the trial of the issues, and that the Court of Equity should still permit him to proceed by restraining the defendants from opposing to him the legal estates." And the opinion of Lord Chief Justice Tindal¹ states even more fully the same matter. In *Crow v. Tyrrell*,² an heir at law was held not entitled to file a bill to obtain possession of title deeds without asserting his legal title to the estate by a proceeding at law. The difference between the two modes of proceeding is considerable, for on a decree by the Court of Chancery the successful party is put into possession, and the title cannot be further litigated; the Court would exercise its summary power to prevent that, but after a verdict and judgment for the heir in ejectment, the devisee may bring a fresh ejectment, and submit the matter to a fresh investigation. — [THE LORD CHANCELLOR. — If the allegations were different, and the demise was laid on a different day; but if they were the same, the first judgment would be conclusive.] — That does not appear to be clearly settled at present in Ireland. In *Crow v. * Tyrrell*, the heir at law was re- *17 quired to make out at law his title to the estate, and it was said that after he had done so, but not till then, equity would give him all necessary assistance to put him in possession of the title deeds. In *Scaife v. Scaife*,³ an heir at law who had proceeded by bill in equity, when he might have proceeded by ejectment, was held liable to costs, as for a vexatious suit.

The proceedings in the Court below have likewise been irregular. An order, dated 31st January, 1852, was made, directing the trial of the issue. After verdict on that trial, an application was made to the Court to alter the words of that order, and they were altered. The words "and the defendant's counsel not objecting," were introduced. This was entirely erroneous. The words

¹ 2 Russ. & M. 14.

² 4 Russ. 309.

³ 8 Madd. 179.

originally in the order did not show a consent, and, in fact, none was given. Besides, Mrs. Boyse could not consent, for she was at that time a married woman, and as such, no consent of hers could be binding upon her: *Hodgson v. Merest*,¹ *Elston v. Wood*,² *Sanders v. Allen*,³ *Brown v. Hayward*,⁴ *Turner v. Turner*.⁵ There was no necessity for objecting at that stage of the cause to the order for the issue. Neither party to an issue directed by the Court is by going to trial precluded from afterwards appealing against the order by which the trial was directed: *Butlin v. Masters*,⁶ *Parker v. Morrell*.⁷

The order made here on further directions declaring the will to be null and void, and directing the sheriff to put the respondent into possession of the estates, is one altogether beyond the * 18 power of a Court of equity, even in a * case of fraud: *Story*,⁸ *Fonblanque*.⁹ The case of *Middleton v. Sherburne*¹⁰ is the only one in which a Court of equity has affected to exercise such a power, and that case proceeded on a mistake. Lord Abinger there expressed an opinion,¹¹ that in the case of *Kerrich v. Bransby*¹² (where that power had been exercised in the Court of Chancery,¹³ but the decree was reversed in this House), the bill had been dismissed upon the merits; and he acted on that opinion. But that opinion is now known to be erroneous, and in *Allen v. M^cPherson*,¹⁴ in this House, where the subject was fully discussed, and all the authorities were referred to, it was so treated by Lord

¹ 9 Price, 568.

² 2 Mylne & K. 678.

³ 2 Molloy, 329.

⁴ 1 Hare, 432.

⁵ 2 De G., M. & G. 28, 37-41.

⁶ 2 Phill. 290.

⁷ 2 Phill. 453.

⁸ 1 Eq. Jurisp. § 184, p. 205, and n.

⁹ Bk. 1, c. 2, § 3, n. u.

¹⁰ 4 Younge & C. Exch. 358.

¹¹ 4 Younge & C. Exch. 379.

¹² 7 Brown, P. C. 437. See also *Hume v. The Earl of Ely*, 7 Brown, P. C. 469.

¹³ See *Farrington v. Knightly*, 1 P. Wms. 548, where Lord Chancellor Parker says: "I do not take it to be a rule that a will is not in any case to be set aside in equity for fraud, for I lately set aside such a will for fraud myself, in the case of one Bransby" (decree made 14th November, 1718, was reversed. 7 Brown, P. C. 437); "I mean I decreed the executor who gained the will to be but a trustee. An executor, from his name, is but a trustee, he being to execute his testator's will, . . . and this is the reason why the Spiritual Courts cannot compel a distribution, because they cannot enforce the execution of a trust." As to the reason for filing a bill in equity, see also *Wind v. Jekyl*, 1 P. Wms. 575.

¹⁴ 1 H. L. Cas. 191, 212, 225, 236.

Lyndhurst, Lord Brougham, and Lord Campbell. The principle on which the jurisdiction claimed for the Court of Chancery was said to be founded, was there fully examined by Lord Lyndhurst, who referring to *Kerrich v. Bransby* when in the Court of Chancery, said: "The bill prayed that the will might be cancelled, but this part of the prayer was not adopted in the decree which merely directed that the legatee should account to the plaintiff, *and that the plaintiff should be at liberty to use his name *19 to get in the personal estate; in effect, treating him as a trustee. This House resisted the encroachment, and reversed the decree." That case must therefore be taken to decide that a Court of equity has no jurisdiction, even on the ground of fraud, to set aside or alter a will, and to declare the devisee a trustee; and in *Gingell v. Horne*¹ that principle was applied to the case of the next of kin proceeding against executors, when the will was expressly alleged to have been obtained by fraud.

Independently of the general principle that a Court of equity cannot by decree set aside a will and direct the sheriff to put the heir into possession, it happens here that there were three other wills of this testator, dated in 1824, and also on the 4th and on the 5th of August, 1842, which were not brought before the Court at all, though the fact of their existence was communicated to the Court; but if any one of them was valid, the title of the heir at law, as such, to be put in possession, could not be maintained; if there had been an issue granted at all, it should have been to try the validity of all the wills; but the granting an issue at the prayer of the heir at law was altogether wrong, for by such a course he is not put to prove his pedigree at all, which he must do if he is left to bring ejectment, as in that mode of proceeding he could only recover by the strength of his own title.

Then as to the case on the merits, mere change of opinion in the testator is not sufficient to defeat a will: *Barry v. Butlin*,² *Browning v. Budd*;³ but here there was no change of opinion, for the testator generally lived abroad, saw very little of his relatives, and there never was a time when he was on intimate terms with them, and there are * many letters of his given in evidence *20 which show that he had serious grounds of differences with them; the will of 1824 itself shows how little friendly feeling existed

¹ 9 Sim. 539.

² 6 Moore, P. C. 430.

³ 2 Moore, P. C. 480.

between them. There is no pretence for alleging duress in this case. The principle as to affecting a will by evidence of duress or by undue influence is clearly laid down in *Williams on Executors*.¹ "The influence to vitiate an act" (he is speaking of a will) "must amount to force and coercion, destroying free agency; it must not be the influence of affection and attachment; it must not be the mere desire to gratify the wishes of another, for that would be a very strong ground in support of a testamentary act." The rule thus stated is borne out by all the authorities: *Williams v. Goude*,² *Mountain v. Bennet*,³ *Von Stentz v. Comyn*,⁴ *Jones v. Godrich*,⁵ *Kelly v. Thewles*.⁶ There is no circumstance in the evidence here which brings this case within the principle of the rule thus declared. The verdict was not justified by the evidence, and most of the evidence of alleged undue influence was purely circumstantial, and ought not therefore to have been admitted; the direction to the jury was also erroneous.

Then as to the decree which is the subject of the supplemental appeal, the finding that there was a sum of 21,961*l.* 19*s.* 10*d.* due was reported by the Master after the death of Mr. Boyse, and no order could properly be made on that finding to direct the appellant to pay that sum into Court, for that sum was compounded of money received before her marriage, during her marriage, and after the death of her husband. The decree on which the

finding was made was a joint decree against the appellant * 21 * and her husband; the accounts were taken under that decree; the sum found due was a gross sum composed in great part of monies received during the continuance of the marriage, and under these circumstances the order for payment of that sum could not be made upon her alone, for that would be to render her personally liable for the debts of her husband.

The Solicitor-General (Sir R. Bethell) and *Mr. Whiteside* (of the Irish bar) for the respondents. — The proceedings here have been in perfect conformity with the principles and practice of the Court of Chancery. In a bill by an heir at law, impeaching a will on a ground such as exists here, that undue influence or fraud has produced what may be denominated the absence of a disposing

¹ Vol. 1, Pt. 1, Bk. 2, c. 1, § 2, p. 45 6th ed.

² 1 Hagg. Ecc. 581.

³ 1 Cox, C. C. 353.

⁴ 12 Irish Eq. 622.

⁵ 5 Moore, P. C. 16.

⁶ 2 Irish Ch. N. S. 510.

mind, it is entirely within the discretion of the Court either to grant an issue *devisavit vel non* or to leave the heir to proceed by ejectment, removing out of his way all those technical obstacles which might prevent the decision of his legal rights. The Court is not bound to adopt one of these courses in preference to the other, but may take either in its discretion; and in *Grove v. Young*,¹ the Court, having at first directed an issue, afterwards, at the desire of the heir, changed the order, and directed an ejectment.

Secondly, the form of the issue here was sufficient; it was not necessary to have several issues with relation to all the wills, since it was this alleged will of the 6th of August which was alone impeached by the respondent.

Thirdly, it is not competent to the appellant now to take these objections to what was done in the Court below, she having assented to the issue, taken her chance of the verdict, and then having again recognised and adopted this * mode of * 22 proceeding, by applying to the Court for a new trial.

It is a settled rule of equity that the propriety of a particular order must be decided with reference to what was before the Court when that order was made. Now, in January, 1852, the counsel for Mr. and Mrs. Boyse consented to the trial of an issue, and the order was in reality (though it did not at first recite that fact) made on that consent; and therefore, if that order had then been brought by appeal to this House, it would have been affirmed as of course. In no way whatever, either on the principles or practice of Courts of equity, or on the circumstances which were at that time before the Court in this particular case, could a want of jurisdiction be alleged. In *Lord Donegal's Case*,² Lord Hardwicke spoke of the jurisdiction of a Court of equity to afford "relief against any deeds or wills which may be improperly obtained" as being perfectly established. *Pemberton v. Pemberton*; ³ and the other cases cited for the purpose of showing a want of jurisdiction are, when properly considered, authorities in favour of that jurisdiction.

In what sense can it be contended that equity has no power to declare what is the last will of a testator as to real estate? It is every day's practice for equity to make decrees which necessarily

¹ 5 De Gex & S. 38.

² 13 Ves. 290.

³ 2 Vez. Sen. 408.

involve and determine that very question. All that can truly be said is, that *proprio vigore*, equity cannot try the fact of sound disposing mind or not, but equity can undoubtedly require to be satisfied that that question has been satisfactorily tried with reference to the sufficiency of the evidence produced, the admission of all proper, the exclusion of all improper evidence, and the correctness of the direction given to the jury. When satisfied on these points, equity can then make such a decree as has been

* 23 made in this case. Lord Eldon, * in *Pemberton v. Pemberton*,¹ expressly declared the existence of such a jurisdiction; and, in *Hylton v. Morgan*,² he intimated his doubts as to the propriety of the practice of proceeding at law before the party had shown that he would ultimately be entitled to relief in equity. Equity is bound, in some particulars, to follow the law, but it is not bound to adopt the conclusions of a jury. It may examine the established facts, and proceed on its own estimate of them. Here the will is impeached on the ground of fraud, and of such influence as prevented the exercise of a free disposing mind. In matters involving imputations of fraud the jurisdiction of a Court of equity is without limit; *Richmond v. Tayleur*,³ where Lord Maclesfield declared, "that if fraud or surprise had appeared he would have set aside the previous decree"; and *Barnesly v. Powel*,⁴ where Lord Hardwicke expressly adopted that principle. It is bound to ascertain facts in a case like this by an inquiry before a jury in a Court of law, but being satisfied by the result of that inquiry, it has absolute power to apply the doctrines of equity to the case. In *Stace v. Mabbot*,⁵ where the question was as to the forgery of a paper relative to the estate of a Captain Girlington, Lord Hardwicke directed certain issues to be tried; they were tried; the learned Judge who tried them was satisfied with the verdict, but Lord Hardwicke was not satisfied, for "new evidence, which was not before the jury," was produced to him, and he sent the case to a new trial, and in doing so he referred to a case before Lord King, where, after several trials in a matter relating to the forgery of a rent charge, Lord King had the deed brought

* 24 into Court and annulled. *Kerrich v. Bransby*⁶ has not the effect sought to be attributed to it. There the decree ap-

¹ 13 Ves. 297, 299.⁴ 1 Vez. Sen. 119.² 6 Ves. 293.⁵ 2 Vez. Sen. 552.³ 1 P. Wms. 734.⁶ 7 Brown, P. C. 437.

pears to have been made without a trial at law to determine the facts, and that was the real ground of the appeal; but even there it was admitted that when a question involving the validity of a will was brought before a Court of equity, that Court had full power to direct an issue *devisavit vel non*. In *Raworth v. Marriott*,¹ such an issue was directed as a matter of course; *Bennet v. Vade*² and *Webb v. Claverden*³ are really to the same effect, and only show that without a previous trial at law the Court of Chancery will not proceed to set aside a will, but they impose no restriction on the jurisdiction of the Court after such a trial. The reference to the register in these cases proves nothing the other way. In *Webb v. Claverden* the bill was retained for twelve months, but the result is the same whether the bill is retained in order to allow the matter to be tried by an ejectment, or whether the shorter course of directing an issue is adopted. In *Barnesly v. Powel*⁴ the will was impeached on the ground of forgery, and there, though probate had been granted by the Prerogative Court, Lord Hardwicke said: "As to the sentence of the Prerogative Court, as at present advised, that will create no difficulty if the will is found forged, for there the plaintiff's consent appears to have been obtained from the misrepresentation of that forged will; that fraud infects the sentence, against which the relief must be here; I should not scruple decreeing the defendant who obtained that probate to stand as a trustee in respect of that probate, which would not overturn the jurisdiction of that Court."

* The next case is that of *Bates v. Graves*,⁵ where Lord * 25 Loughborough drew his own conclusions on the evidence and on the observations made by the Judge at the trial, being unable, on account of the death of the Judge, to obtain from him any opinion as to the verdict. In *Pemberton v. Pemberton*⁶ the whole evidence and the record were examined, and the question whether any evidence had been improperly rejected was considered. Now, when a Court of equity determines whether the evidence and the proceedings in the Court of law, where an issue is tried on the validity of a will, are or are not satisfactory, it does in substance and in fact decide the question of the validity of the

¹ 1 Mylne & K. 643.

² 2 Atk. 324.

³ 2 Atk. 424. See ante, pp. 12, 13, as to both these cases.

⁴ 1 Vez. Sen. 119, 284.

⁵ 11 Ves. 50, 13 Ves. 290.

⁶ 2 Ves. Jun. 287.

will. In *Jones v. Jones*¹ relief was refused, not for want of jurisdiction, but because the case did not disclose sufficient grounds for the interference of a Court of equity. *Shewen v. Lewis*,² in like manner, raised no question of jurisdiction, but depended on the form of the bill, and there an issue was granted. *Jones v. Frost*³ merely decides that a Court of equity will not order a will of personalty to be delivered up and a receiver appointed until the plaintiff can obtain from the Ecclesiastical Court a grant of probate. That was merely refusing to afford equitable relief before the party had taken any step to show that he was entitled to ask it, and that was the principle acted on in *Crow v. Tyrrell*,⁴ where an heir at law out of possession was held not entitled to file a bill to obtain possession of the title deeds without first asserting his legal title to the estate. The correctness of that decision may be admitted,

but it does not show that if the heir had been kept out of possession * under colour of a will he might not have come into equity to impeach that will, and to have an issue to try its validity. *Scaife v. Scaife*⁵ shows that such a mode of proceeding is perfectly regular. That was a bill by an heir at law impeaching several wills, and alleging insanity in the testator. An issue was granted, and the case of the heir failed. The Master of the Rolls held him liable to the costs of the issue. That is all which the case decides, and the other observations of the Master of the Rolls are extra-judicial. In *Strickland v. Strickland*⁶ the claim of the plaintiff being simply one of a legal nature, and not requiring the assistance of equity to assert it, his bill was of course dismissed. Some of the observations of Lord Abinger in *Middleton v. Sherburne*⁷ may be admitted, to some extent, to be erroneous, but the decision itself was correct. There a will was impeached as obtained by undue influence. The plaintiff did not wait for an issue, but as soon as the answer came in applied for a receiver. *Buckland v. Soultten*⁸ was cited in support of the application, but Lord Abinger directed an issue. He would not decide a contested matter of fact without the aid of a jury, and he

¹ 3 Mer. 161.

⁴ 3 Madd. 179. See the bill, 2 Madd. 397.

² 3 Mer. 167, n.

⁵ 4 Russ. 309.

³ 3 Madd. 1.

⁶ 6 Beav. 77.

⁷ 4 Younge & C. Exch. 358. The decision was appealed against, but the appeal was dismissed for want of prosecution. 9 Clark & F. 72.

⁸ 4 Younge & C. Exch. 373, n.

adopted that form as best calculated to afford him the information he required. *Allen v. M^cPherson*¹ was a case which in effect determined that a decision of the Ecclesiastical Court could not be impeached by a bill in Chancery, but must be made the subject of appeal to the Privy Council; but even that decision was not unanimous: there was a strong division of opinion among the noble and learned Lords who advised the House on this matter, and no doubt was expressed as to the general right of an heir * at law to come into equity and dispute a will of real estate. * 27 In *M^cGregor v. Topham*,² it was assumed that the rule as to granting an issue *devisavit vel non* was one which existed for the benefit of the heir, and the only question there was whether the Court below was bound to grant a new trial of such an issue on his demand, and there, as in *Wilson v. Beddard*,³ it was held that he was not entitled to a new trial as a matter of course.

As to the mode of considering the evidence on the trial of such an issue, the cases of *Gibbs v. Hooper*,⁴ *Waters v. Waters*,⁵ and *Winchilsea v. Wauchope*,⁶ show that Courts of law and Courts of equity proceed on the same principles in such cases, and that in either of them new trials may be granted till the Court is satisfied with the verdict, but they will not be granted unnecessarily. Here the result of the first trial was satisfactory, and the Court was therefore not bound to grant a new trial, but was bound to apply the decision; for, as *Bootle v. Blundell*,⁷ and *Johnston v. Todd*,⁸ show, the object of an issue is to obtain information which may satisfy the conscience of the Court, and that being satisfied, the Court may act as justice requires.

The Court was not bound to grant a new trial. There was no valid objection to the evidence received, for in *Raworth v. Marriott*⁹ it was expressly declared that in such a case circumstantial evidence is properly receivable. No objection was made that evidence was improperly rejected, nor was there any objection made at the trial to the direction given by the learned Judge to the jury. Not being then made, it cannot be made afterwards: *Ball v. Mannin*;¹⁰ and nothing can in such a case as this be * treated as a * 28

¹ 1 H. L. Cas. 191.

² 3 H. L. Cas. 132.

³ 12 Sim. 28.

⁴ 2 Mylne & K. 353.

⁵ 2 De Gex & S. 591.

⁶ 3 Russ. 441.

⁷ 19 Ves. 494.

⁸ 3 Beav. 218, 8 Id. 489.

⁹ 1 Mylne & K. 643.

¹⁰ 1 Dow & C. 380.

ground for a new trial, which would not be a ground for a bill of review: *Curtess v. Smalridge*.¹ *Standen v. Edwards*² is to the same effect. The case here was put upon the ground of undue influence. Such influence may be exerted by a wife over a husband, as well as by a husband over a wife; and in *Marsh v. Tyrrell*,³ which was a case of the latter sort, the Ecclesiastical Court set aside a new will, pronounced in favour of an old one, and condemned the husband in costs. If the influence is such as, however exerted, amounts to making the testator an instrument in the hands of another person, it is sufficient to invalidate the will: *Bridgeman v. Green*.⁴ It was so here. The proof that no such influence was exerted lies on the person who sets up the will: *Panton v. Williams*,⁵ and *Swinburne*.⁶ The evidence in this case showed that this testator had been under such influence; the evidence satisfied the jury, and the verdict was not against the evidence. If so, though it may even be against the Judge's opinion, no new trial shall be granted. *Anonymous*,⁷ *Swain v. Hall*,⁸ *Carstairs v. Stein*,⁹ *Wood v. Thompson*.¹⁰ A Court of equity will not prolong litigation by granting a new trial, unless where it is clear that injustice has been done by the first verdict. *Bateman v. Willoe*.¹¹ A trial in a case like this is one to which the heir is entitled, and unless there is something positively wrong in the manner of proceeding the Court ought to be bound by the verdict in his favour.

There can be no substantial difference between the Court of

* 29 Equity granting an issue *devisavit vel non* and directing * the heir to bring an ejectment. In the first the opinion of a jury is taken on the question of fact, and the Court does not make any order till it is satisfied that on the trial justice has been done, and that the verdict is correct; in the other exactly the same course is followed in equity, when equity interferes at all; and if one party obtains a verdict and judgment in ejectment, the other cannot now harass him by a fresh ejectment. It is the same in Ireland as in England. In *Armstrong v. Norton*¹² a judgment by default in ejectment was, in trespass for mesne profits where only

¹ 1 Ch. Cas. 43.

² 1 Ves. Jun. 133.

³ 2 Hagg. Ecc. 84.

⁴ Wilm. Cas. & Op. 58.

⁵ 2 Notes of Cases, Supp. xxi.

⁶ Vol. 1, p. 17.

⁷ 1 Wils. 22.

⁸ 3 Wils. 45.

⁹ 2 Rose, 178.

¹⁰ Car. & M. 171.

¹¹ 1 Sch. & L. 201.

¹² 2 Irish Law, 96.

the general issue was pleaded, held to be conclusive evidence of the plaintiff's title. *O'Donnell v. Ryan*¹ recognises that rule. In this country the Common Pleas, in *Wilkinson v. Kirby*,² held a replication of judgment recovered in an ejectment and an entry thereon to be an estoppel to a plea of not possessed in an action of trespass. The result of an ejectment would, therefore, be as conclusive as the result of a decree founded on an issue, and in that respect this order is unobjectionable.

The objection to the order directing the trial comes too late. In *De Tastet v. Bordenave*³ there was an order directing an issue, and the Master of the Rolls thought that it could not be appealed against after the trial had taken place. No objection to that opinion was made on the appeal. It would be a fraud on the Court to allow the appellant now to insist on objecting to that to which she consented, or at least did not object, in the Court below. In *Chamley v. Dunsany*⁴ Lord Eldon condemned such a practice, saying: "When those opportunities are passed by, are we not entitled to say the point was waived in the * Court below in * 30 order to make it the subject of appeal here?" In *Hodgson v. Merest*,⁵ where the objection was taken in time, the case stood over to enable the plaintiffs to supply by evidence the facts in the answer which had been sought to be used against the wife as admissions made by her in the suit; but had the application been delayed the same course would, no doubt, have been followed that was adopted in *De Tastet v. Bordenave*.⁶

As to the supplemental appeal, the order for payment of the 21,961*l.* 19*s.* 10*d.* was properly made. The husband of the appellant disclaimed all interest, subsequent to the marriage, in the rents and profits, which in fact were received by the appellant in her own separate right, and she herself, when going before the Master, put in a separate discharge. In *Adair v. Shaw*,⁷ a *feme covert* obtained administration and the goods were wasted; during the coverture the husband died: his assets were held to be chargeable in equity for the waste during the coverture, but it was also intimated that if the wife survived him she would be charged if the assets of the husband should prove insufficient. In the Court below

¹ 4 Irish Law, N. S. 44.

² 23 L. J., N. S., C. P. 224.

³ Jac. 516.

⁴ 2 Sch. & L. 690, 713, 720.

⁵ 9 Price, 563.

⁶ Jac. 516.

⁷ 1 Sch. & L. 243.

the Lord Chancellor relied on two cases of *Johns v. Adams*¹ and *Rigley v. Lee*,² in the first of which the principle was clearly laid down, that "though the *feme* hath not any goods during the coverture, yet, because the baron is charged only in respect of the *feme*, and she might have the goods if she had survived, execution might then be taken against her," and of that principle Lord Redesdale in *Adair v. Shaw*³ expressed his entire approval.

* 31 There is a still earlier precedent in the Year * Books,⁴ where the liability of the wife is stated precisely to the same effect.

Sir F. Thesiger, in reply, reviewed all the decisions referred to in argument, and on the question of the propriety of granting a new trial insisted that even within the limits contended for by the other side, this case was one in which a new trial ought to be granted; there had been a misdirection, and the verdict here was not only not supported by, it was at variance with, the evidence.

July 15.

THE LORD CHANCELLOR. — My Lords, I do not at this moment propose to give a decision, or indeed to express any very decided opinion upon this case; I wish rather to point out what I consider to be the several points that will have to be decided. [His Lordship stated the nature of the case.]

The first question that was made upon the part of the now appellant, the defendant in the suit in equity, was, that this was an erroneous proceeding *ab initio*, for that upon a bill filed by an heir at law the proper course is for a Court of equity not to direct an issue to try whether there is or is not a valid will, for that assumes a jurisdiction which the Court does not possess, but to leave the plaintiff, the heir at law, to establish his legal right, and that there is no jurisdiction whatever on the part of a Court of equity to sustain any such bill, except where from accidental circumstances the heir at law is by technical impediments, as, for instance, by the existence of outstanding legal interests, prevented from proceeding to try his title at law, and therefore it is said that there has been a total miscarriage from the beginning in directing such an issue. That proposition is controverted by the defendants, and the first question which your Lordships have to deter-

¹ Cro. Jac. 191.

² 1 Sch. & L. 243.

³ Cro. Jac. 356.

⁴ 39 H. 6, 44, 45.

mine, and a very important * one it will be, is, whether a * 32 Court of equity has, in cases of this sort, any other jurisdiction than that of enabling the heir at law to do that which, but for impediments created by the law, he might do through the medium of the law.

Supposing it should ultimately be your opinion that there is no jurisdiction at the instance of an heir at law impeaching a will, except to remove legal impediments, the next question will be, although there may not exist such a jurisdiction, whether if the Court assumes to exercise such a jurisdiction and the devisee does not object to it, such an objection can be raised after a trial has taken place ; first of all, if such an objection is made by a devisee competent to object at the time to the order for an issue, and, secondly, how far the case may be affected by the circumstance that the devisee not so objecting was a married woman, and consequently not *domina* of her own defence.

Supposing your Lordships should be of opinion that the Court did that which it had no right to do, and that even that consent or *quasi* consent, the absence of actual objection on the part of the defendant does not alter the case, then there has been a miscarriage throughout, and you will have to set the proceedings right from the beginning, and to direct the Court of Chancery in Ireland to vary its decree by making such a decree or order as it ought to have made, namely, by simply removing the legal impediments, and leaving the heiress at law to proceed as she and her husband may be advised.

Supposing, however, your Lordships should come to a contrary opinion, and think that either there was original jurisdiction in the Court to direct an issue, if it was convenient so to do, instead of leaving the party to bring an ejectment, or, if there was not such original jurisdiction, that from the course taken it is too late now to raise any * objection on that ground ; then your * 33 Lordships have to consider whether, with what took place after that decree was made, and the trial was directed, your Lordships ought to rest satisfied, or whether some further inquiry or trial ought to take place, and that depends upon this important question, whether, supposing it was right to direct a trial, the trial has been such as ought to satisfy the mind of the Court. Now, on that subject it has been argued that trials directed for the purpose of establishing the validity of a will, are not trials directed

according to the ordinary course of a Court of equity, when it merely asks the assistance of a jury to satisfy, as it is called, its conscience, but that they are trials to which one party is entitled *ex debito justitiæ*, and that a Court of equity has nothing to do but to defer to whatever may be the result of such a trial.

If your Lordships should be of opinion that in no circumstances can a Court of equity question a trial that has been directed to determine the validity of a will, but is bound to accept the result, whether coinciding with its own opinion or not, provided only that the trial shall have taken place regularly; then the question to which the attention of the House must be directed is, whether this trial has been conducted regularly, and that will involve these other questions: Whether there was any commission or omission of statement and direction in the summing up of the Judge that renders that trial unsatisfactory. It is suggested that the learned Judge, whose charge is given at very great length in the printed papers in this case, omitted to point the attention of the jurors to that which was very important indeed to guide them in the decision at which they were to arrive, namely, what was the legal meaning or import of the words "undue influence," when used in reference to obtaining a will. For it is said that upon such a subject

* 34 jurymen, not being men with legal minds, * are extremely likely to fall into great error, and might think undue influence was established where a man who was not of strong mind, united to a woman of very strong mind, should be led to devise away large family estates from his own relations to hers, whereas in truth that would not of itself be undue influence according to the construction which the law would put upon that term. Undue influence, in order to render a will void, must be an influence which can justly be described, by a person looking at the matter judicially, to have caused the execution of a paper pretending to express a testator's mind, but which really did not express his mind, but expressed something else, something which he did not really mean.

Supposing your Lordships should be of opinion that there was any omission of a material sort in the direction to the jury, so that the trial was unsatisfactory, then whatever may be the result of the previous proceeding, a new trial would follow as a matter of course. A Court of law, perhaps, would not be bound, certainly your Lordships, in the position of a Court of equity, would not be bound to say that there shall be a new trial, simply because something was

said which ought not to have been said, or something left unsaid which ought to have been said. Your Lordships would look to the materiality of the thing said, or omitted to be said, and if you should think it not to be material, you would not disturb the verdict. But if you thought that the jurors had been misled by not having their minds directed to a very important consideration in enabling them to form a correct judgment, that would be a ground for saying that the trial had not been satisfactorily and properly conducted.

Supposing your Lordships should be of opinion, not only that the previous proceedings were regular, but that the trial was properly conducted, then arises this question: * Whether, * 35 upon a trial properly ordered and properly conducted, your Lordships have any jurisdiction further than to receive respectfully the verdict of the jury, and to act upon it. Now upon that subject it was argued strongly that that is the law with regard to verdicts on this particular subject. On the other hand, it was contended that there is no real difference between verdicts on this and on other subjects; and that just in the same way as a Court of law is bound by a verdict, but nevertheless, if it shall perceive grounds to lead judicially to the conclusion that the jury must have been mistaken, and looked at something in a wrong point of view, and that the facts are clear the other way, then the argument is, that, just in the same way as a Court of law, though ordinarily bound by the verdict, will nevertheless direct a new trial where that state of things exists, so here a Court of equity would be entitled to do the same thing; and that if, looking at the facts, it should be found that there was evidence so preponderating in favour of a view contrary to that which the jury has taken, a new trial must be directed. If your Lordships should be of opinion that a Court of equity has jurisdiction in such a case, then lastly comes the question: Whether, looking at the evidence as it was given at law, and the evidence taken in equity, you think that there is that great variance between what appears to you to be the only rational conclusion to be drawn from it, and that at which the jurors have arrived, that you ought to direct a new trial.

These are the questions arising upon the original appeal. Then there is a further question, and one of some importance, arising in the supplemental appeal, which is this: When the verdict came back to the Court of Chancery in Dublin, that Court, acting upon the

assumption that it had jurisdiction upon the verdict being
 * 36 found against the will, * declared the will to be void for fraud,
 and it considered that it had jurisdiction, as consequent upon
 that, to put the plaintiff, the heiress at law, into possession: the
 question then arises, first, whether that was right; whether there
 were not other considerations arising out of other wills which made
 that wrong. That question, indeed, arises upon the original ap-
 peal; and then upon the supplemental appeal arises this further
 question, whether, in proceeding as the Court did, to charge the
 defendants below with the rents which had been received for
 several years, there has not been a miscarriage, an error in point
 of law, in charging Mrs. Boyse with all or any portion of these
 rents, a large portion having accrued due during the time when
 she was the wife of Mr. Boyse, and the other portion having
 accrued due before she became Mrs. Boyse. That is the question
 which arises upon the supplemental appeal.

Having just glanced at what all these subjects are, I can only
 say that the case is one involving a great number of points of great
 nicety and difficulty, very many authorities have been referred to,
 and I must request time to look into and examine them atten-
 tively, before I can finally advise your Lordships as to the course
 which I think ought to be taken in this very complicated, difficult,
 and important case. I therefore move that the further considera-
 tion of this case be postponed.

1857. March 13.

THE LORD CHANCELLOR, after stating the circumstances of the
 case, said: The appeal was argued very fully at the latter part of
 the last session, but no judgment was then pronounced by your
 Lordships.

The first point made in argument by the appellant was, that the
 original decree was wrong, and so that all the proceedings conse-
 quent on it must fall with it.

The relief was asked by the bill on the ground that the
 * 37 * plaintiffs could not proceed to establish their title by eject-
 ment, in consequence of the existence of outstanding terms,
 which would present a legal bar to such a proceeding. The appel-
 lant contended in argument that, in such a case, the only proper
 relief is that the defendants at law should be restrained from set-
 ting up the outstanding terms in bar of the plaintiff's title, and so

that the decree actually made, directing an issue *devisavit vel non*, was erroneous, and not warranted by the principles or practice of Courts of equity.

I go along with this argument to the extent of saying, that the relief by merely restraining the defendants from availing themselves of the bar resulting from the accident of an outstanding term, is, in general, the most fit and proper relief. Such a course leaves each party at liberty to assert by legal proceedings what is in substance a mere legal right. But I cannot go the length of saying that the Court of Chancery has not the power to direct the legal question to be tried in a different form of proceeding, as, for instance, by an issue, if such a course appears more convenient. Cases may arise where effectual relief would not be given by merely restraining the parties from setting up an outstanding term. Suppose the subject matter of the devise is a mere equitable right, as, for instance, a contract to purchase, or an equity of redemption of a mortgage in fee, when the mortgagee is in possession; in these and similar cases it may be impossible to enable the heir to raise the question as to the validity of a will, without doing something more than merely restraining the party claiming under it from setting up an outstanding term in bar to an ejectment at the suit of the heir. It must, therefore, be a matter in the discretion of the Court what course shall be taken. And that being so, it would be very inexpedient that this House should interfere with what has been done in the exercise of that discretion, unless it appears that injustice * has been, or is likely to be, * 38 its consequence. I do not mean to say, that in the exercise of my discretion, if I had been the Judge originally hearing this case, I should have taken the course of directing an issue, instead of merely enabling the heir at law to proceed by ejectment. Indeed, I doubt whether, if, at the original hearing, the point had been put to the Lord Chancellor of Ireland, as to which of these two courses he would take, he would have made a decree for an issue. I incline to think he would not. That mode of proceeding did not originate from any suggestion of his, but was proposed at the bar, and acceded to by the Lord Chancellor. If the course taken had been one which the Court had no right to take, then it may be said the circumstance that it did not originate with the Judge himself, but was adopted in consequence of the suggestion of counsel, could not give it validity. But where either of two

courses is open to the Judge, and he in his discretion adopts that which the counsel on both sides approve, it must be a strong case indeed, which should induce your Lordships afterwards to interpose, and say that his discretion was improperly exercised, unless, indeed, it appears that some gross injustice has been its result. The question, therefore, is, whether here the consequence of the course taken has been so palpably injurious to the appellant, that although it was adopted with the sanction, if not at the suggestion, of her counsel, it ought to be treated by this House as erroneous, and so be dealt with accordingly.

In order to come to a just conclusion on this point, let us consider what was the precise practical difference to the appellant from the adoption of the one course rather than the other. Where on a bill, by an heir disputing a will, nothing is done beyond the removal of legal impediments, then the heir brings an ejectment against the party in possession claiming as devisee; and * 39 assuming the heirship * of the plaintiff to be, as it was in this case, admitted, the defendant begins at the trial, and adduces his evidence in support of the will. The heir then meets this case by such evidence as he can bring to impeach the will. The defendant replies, and the jurymen give their verdict. Precisely the same thing happens on an issue *devisavit vel non*. So far, therefore, as the trial is concerned, it is of no importance which course is taken. Supposing the verdict to be against the will, and that there is no motion for a new trial, then, if the proceeding was by ejectment, the heir obtains possession by virtue of a writ of *habere facias possessionem*. If the course taken was to direct an issue, then the Court of Chancery causes possession to be given to the heir. In either case the devisee is compelled to give up possession to the heir, and whether this result follows from one species of process or another cannot be material. If the result of the trial is different, and the verdict is in favour of the devisee, then, whatever course was taken for the purpose of trying the validity of the will, the bill of the heir will be dismissed, and the devisee will retain his possession.

So far, therefore, it does not appear to be of any real importance to the devisee whether an issue is directed, or whether the Court merely removes the legal impediments to an ejectment. But it was argued in support of the appeal, that though the immediate result of both proceedings may be the same to the devisee,

yet the ulterior consequences are very different. For that if the heir succeeds in a proceeding by ejectment, the party claiming as devisee may, after he has been turned out of possession, raise the question again by bringing an ejectment on his part to which the former recovery against him would be no bar ; whereas when the Court of Equity has, in the result of the trial of an issue, declared the devise void, and put the heir into possession, the party who relies on the will, being so dispossessed, * has no further * 40 opportunity of raising any question as to its validity.

There is a fallacy in this reasoning. It is true that where, after the trial of an issue *devisavit vel non*, and a finding of the jury against the will, the Court of Chancery has made a decree declaring the devise void, and putting the heir into possession, the party evicted cannot on the same state of facts reopen the question by a new proceeding. But neither in general could he, if, instead of directing an issue, the Court had merely restrained the setting up of an outstanding term in bar to an ejectment brought by the heir, for the existence of such a term would create the same impediment in the way of the devisee out of possession as it had done in the way of the heir ; and the Court of Chancery would not, after a satisfactory trial and verdict against the devisee, assist him by the removal of whatever legal bar might stand in his way.

If, indeed, the trial was not satisfactory, or if any new facts were discovered that would alter the case, the Court might then assist the party in claiming under the will, by restraining the heir in possession from setting up the term as a bar to legal proceedings. But similar relief might be had on the trial of an issue ; for the Court would not be bound by an unsatisfactory trial ; and even after the finding of a jury on an issue *devisavit vel non*, and a decree thereon against the will, the question, if a proper case is made, may be reopened on a bill of review, founded on the discovery of new facts. I cannot see that it would be of any practical consequence to the devisee in such a case whether the invalidity of the will had been established in an ejectment or on an issue. I am therefore of opinion that so far as the present appeal rests on the ground of want of jurisdiction in the Court to direct an issue, it must fail.

Upon principle the Court must have a discretion to adopt such a course, where it seems expedient, and modern authorities

* fully bear me out in the view which I have thus taken. * 41

In *Shewen v. Lewis*,¹ reported in a note to *Jones v. Jones*,² Sir William Grant, on a bill by co-heirs impeaching a will, alleging outstanding terms, and praying either an issue or liberty to bring an ejectment, made a decree directing an issue. This was in 1815. A similar course was pursued by Sir John Leach, in *Tatham v. Wright*;³ by Lord Abinger, in *Middleton v. Sherburne*;⁴ and by Sir James Wigram, in *M^r Gregor v. Topham*.⁵

The demurrer in *Jones v. Jones* was allowed on the ground that there was no allegation of outstanding terms, nor any thing stated affording a ground for equitable relief.

The same observation applies to *Armitage v. Wadsworth*,⁶ before Sir Thomas Plumer. There the plaintiff, the heir, stated by his bill that his ancestor had died, seised in fee subject only to certain leases, and that since his death the defendant had got into possession or receipt of the rents, claiming under a pretended will, and he prayed an issue *devisavit vel non*, or liberty to proceed by ejectment, notwithstanding the lease. To this bill the defendant put in a negative plea, denying the existence of any lease. This plea was held to be good, and of course, therefore, the plaintiff's right to equitable relief was gone.

I am aware that in *Jones v. Jones*, Sir William Grant said: "Now although there may have been instances of issues directed on the bill of an heir at law where no opposition has been made to that mode of proceeding, yet I apprehend that he cannot * 42 insist on any such direction." But * Sir William Grant did not, as I conceive, mean to say, that in granting an issue the Court would be exceeding its jurisdiction, but only that the other course was that which in general it ought, if desired by either party, to adopt.

And I am confirmed in this by what fell from Lord Eldon in *Pemberton v. Pemberton*,⁷ a case in which an issue had been directed on a bill filed by an heir impeaching a will. There, on a motion for a second new trial, Lord Eldon said: "In general cases this Court, as it cannot try the validity of a will, sends that to be determined by the proper tribunal, and afterwards does what is right. The habit in doing this has been merely to direct the

¹ 3 Mer. 167, n.

⁶ 3 Hare, 488. See 3 H. L. Cas. 132.

² 3 Mer. 161.

⁵ 1 Madd. 189.

³ 2 Russ. & M. 1.

⁷ 13 Ves. 290.

⁴ 4 Younge & C. Exch. 358.

heir to bring his ejectment, providing that the defendants shall not set up at law a term satisfied or unsatisfied ; and those obstacles being removed, and a trial had in that way under the control of a Court of law, they come back for the account, the deeds, et cetera, which course leaves all the encumbrances just as much encumbrances as if the possession had not been changed. There is great convenience in giving relief in that shape rather than by directing issues, for certainly the question whether a new trial should or should not be had is discussed with much more satisfaction in the Court where the trial was had, than in the Court out of which the issue was directed." I cannot interpret this language as meaning any thing else than this, that the usual and generally more convenient practice is to enable the heir to proceed by ejectment, but that it is open to the Court to direct an issue, if from any cause that course appears desirable.

This being so, and being convinced that, by taking this course, no injustice has in the present case been occasioned, I have satisfied myself that the proceedings below ought * not, on * 43 this ground, to be disturbed. But I come now to the question whether the Lord Chancellor of Ireland was or was not right in refusing the motion for a new trial.

I must preface my remarks on this part of the case by saying that in deciding whether the trial of an issue *devisavit vel non* has or has not been satisfactory, the Court of Chancery cannot act and ought not to act on precisely the same principles as would guide a Court of law, when a similar question may arise on the trial of an ejectment where the same will was in dispute.

In the latter case, if the jury should come to an erroneous conclusion, it is still open to the defeated party to bring his claim in a fresh action under the consideration of a new jury ; and so, from time to time, until the proceeding should have assumed a character of vexation. But the consequence of a verdict satisfactory to the Court of Chancery on the trial of an issue *devisavit vel non* is, as I have already observed, for ever to shut out further litigation and inquiry. The Court, in case the plaintiff is successful, puts him in possession ; if, on the other hand, he fails, the Court will not enable him again to open the question.

It is obvious, therefore, that a trial might have been such as to lead a Court of law to refuse a new trial, and yet might not be so entirely satisfactory as to enable a Court of equity to administer

its final and irreversible relief by giving to the successful party possession of the property, and so putting an end to all further litigation on the subject. In considering, therefore, the question whether the Court of Chancery in Ireland ought to have refused the application for a new trial, I must say whether I am entirely satisfied that the whole case was explained to and understood by the jury, and that the jurors were thoroughly aware of the principles which ought to guide them in coming to a conclusion.

*44 *The first point then is, what was the issue which the jury had to try. The issue to be tried was, whether a certain paper writing, bearing date the 6th of August, 1842, was the last will of Cæsar Colclough, deceased, the late husband of the appellant. That it bore his genuine signature, and was signed by him in the presence of and attested by two witnesses in manner required by law, can hardly be said to have been a matter in controversy. Indeed, no dispute was ever raised on that point. But though a good will so far as relates to its execution and attestation, it yet might not be an instrument having any legal validity. For if the person by whom it was made was not at the time of making it of sufficient mental capacity to enable him to dispose of his property, or if having sufficient disposing mind, he executed it under coercion, or under the influence of fear, or in consequence of impressions created in his mind by fraudulent misrepresentations,—in none of these cases can the instrument be properly described as being his will.

In the first case, the maker is, by the hypothesis, incapable of having a will. In the other cases supposed, though there is a power of willing, yet the instrument cannot be, in contemplation of law, a true expression of that will. I say in contemplation of law; for, perhaps, speaking with strict metaphysical accuracy, the instrument in these latter cases does truly express the testator's will, and the more correct mode of expression would be, that the law will not give effect to the will of a testator when that will has been thus unduly brought about. If I meet a man in the street, and he puts a pistol to my breast, and threatens to shoot me if I do not give him my purse, and to save my life I yield to his demand; or if a neighbour, meaning to steal my horse, asks for the loan of it, stating that he wants it in order to go to market, and

*45 trusting to this representation *I deliver it to him, and then he rides off and sells it,—in both these cases it was my

will to hand over the purse and the horse ; but the law deals with the case as if they had been obtained against my will, my will having been the result in one case of fear, and in the other of fraud. The same principles must guide us in determining whether an instrument duly executed in point of form, so far as legal solemnities are concerned, is or is not a valid will. The inquiries must be : First, was the alleged testator at the time of its execution a person of sound mind ? And if he was, then, secondly, was the instrument in question the expression of his genuine will, or was it the expression of a will created in his mind by coercion or fraud ?

On the first head the difficulty to be grappled with arises from the circumstance that the question is almost always one of degree. There is no difficulty in the case of a raving madman or of a drivelling idiot, in saying that he is not a person capable of disposing of property. But between such an extreme case and that of a man of perfectly sound and vigorous understanding, there is every shade of intellect, every degree of mental capacity. There is no possibility of mistaking midnight for noon ; but at what precise moment twilight becomes darkness is hard to determine.

In this case, however, with respect to the general mental capacity of Mr. Colclough, I do not apprehend that any question is raised. The evidence shows irresistibly that he was a man of superior and cultivated mind. And the only question on this head of inquiry is, whether, though previously of a strong and vigorous understanding, he had or had not become before the 6th of August, 1842, so enfeebled as to be incapable of understanding the nature and effect of a will, or generally of managing or disposing of property. Sir Thomas Esmonde, an old friend of Mr. * Colclough, and who was a witness called by the re- * 46 spondents, states that he saw and conversed with Mr. Colclough at Cheltenham in March or April, 1842, and then found him, though very feeble in body, yet in possession of his faculties. The question is, whether in the period between that interview and the execution of the will on the 6th of August following, the state of Mr. Colclough's mind had changed so that he was incapable then of doing what he was, on the evidence, certainly capable of doing in March or April.

Now with respect to this period of time, a period of four or five

months, four witnesses were called on behalf of the appellant to speak to the state of Mr. Colclough's mind, namely, Miss Kirwan, who was Mrs. Colclough's sister; Mr. Augustus Crofton, her brother-in-law; Dr. Fortnam, Mr. Colclough's medical attendant; and Mr. Williams, his solicitor. Mr. Augustus Crofton left Cheltenham in June, 1842; but he says that Mr. Colclough continued in possession of his faculties up to the time when he last saw him; that is, two or three months before his death, which happened on the 23d of August, 1842. And the other three witnesses say that he continued so up to his death, or till within a day or two of that event.

The will was prepared by Mr. Williams, and was executed by Mr. Colclough in the presence of Dr. Fortnam and Mr. Williams. Dr. Fortnam had been in frequent, and for many months in daily professional attendance on Mr. Colclough, and had therefore ample means of forming a judgment as to the state of his mind; and he states, without any doubt expressed, that from October, 1841, up to the death of Mr. Colclough, on the 23d of August, 1842, his mind was perfectly sound.

Mr. Williams states, that on all the occasions when he attended Mr. Colclough, including, of course, the execution
* 47 * of the will on the 6th of August, he was of sound mind.

Both these witnesses were cross-examined at some length, but no question was put to either of them, tending to call in question the truth or accuracy of their testimony, so far as related to the general capacity of Mr. Colclough.

Indeed, though the question of his general capacity to make a will was undoubtedly raised by the issue, and though the bill does contain a statement that, at the time of the execution of the alleged will, Mr. Colclough was of unsound mind, yet that is not the foundation of the case made by the bill, nor the point to which the evidence was mainly directed. The Attorney-General, in his argument, expressly stated, what indeed the pleadings and evidence fully confirmed, that the will was impeached, not on the ground of general want of capacity, but on the ground of undue influence exercised over him by his wife. This was the point on which the respondents relied. And the alleged infirmity of mind of Mr. Colclough is put forward, rather as tending to show the probability that such influence might have been successfully exercised, than as being such as would of itself make the will invalid. I shall

therefore assume that Mr. Colclough, when he executed the instrument of the 6th of August, 1842, had sufficient mind to enable him to make a will, if left to exercise his judgment freely; and I will consider the other, which is the real point of the case, namely, whether the verdict is satisfactory, supposing it to have proceeded on the ground, that though Mr. Colclough had a disposing mind, yet the document in question cannot be considered to be his will, by reason of its having been obtained from him by the undue influence of his wife.

The difficulty of deciding such a question arises from the difficulty of defining with distinctness what is undue influence. In a popular sense, we often speak of a person *exercising * 48 undue influence over another, when the influence certainly is not of a nature which would invalidate a will. A young man is often led into dissipation by following the example of a companion of riper years, to whom he looks up, and who leads him to consider habits of dissipation as venial, and perhaps even creditable; the companion is then correctly said to exercise an undue influence. But if in these circumstances the young man, influenced by his regard for the person who had thus led him astray, were to make a will and leave to him every thing he possessed, such a will certainly could not be impeached on the ground of undue influence. Nor would the case be altered merely because the companion had urged, or even importuned, the young man so to dispose of his property; provided only, that in making such a will the young man was really carrying into effect his own intention formed without either coercion or fraud.

I must further remark that all the difficulties of defining the point at which influence exerted over the mind of a testator becomes so pressing as to be properly described as coercion, are greatly enhanced when the question is one between husband and wife. The relation constituted by marriage is of a nature which makes it as difficult to inquire, as it would be impolitic to permit inquiry, into all which may have passed in the intimate union of affections and interests which it is the paramount purpose of that connection to cherish; and this is the case with which your Lordships have now to deal.

In order, therefore, to have something to guide us in our inquiries on this very difficult subject, I am prepared to say that influence, in order to be undue within the meaning of any rule of

law which would make it sufficient to vitiate a will, must be an influence exercised either by coercion or by fraud. In the interpretation, indeed, of these words some latitude must be allowed.

* 49 In order to come to the * conclusion that a will has been obtained by coercion, it is not necessary to establish that actual violence has been used or even threatened. The conduct of a person in vigorous health towards one feeble in body, even though not unsound in mind, may be such as to excite terror and make him execute as his will an instrument which, if he had been free from such influence, he would not have executed. Imaginary terrors may have been created sufficient to deprive him of free agency. A will thus made may possibly be described as obtained by coercion. So as to fraud. If a wife, by falsehood, raises prejudices in the mind of her husband against those who would be the natural objects of his bounty, and by contrivance keeps him from intercourse with his relatives, to the end that these impressions which she knows he had thus formed to their disadvantage may never be removed, such contrivance may, perhaps, be equivalent to positive fraud, and may render invalid any will executed under false impressions thus kept alive. It is, however, extremely difficult to state in the abstract what acts will constitute undue influence in questions of this nature. It is sufficient to say, that allowing a fair latitude of construction, they must range themselves under one or other of these heads, — coercion or fraud.

One point, however, is beyond dispute, and that is, that where once it has been proved that a will has been executed with due solemnities by a person of competent understanding, and apparently a free agent, the burthen of proving that it was executed under undue influence is on the party who alleges it. Undue influence cannot be presumed, and, looking to the evidence in the present case, I am unable to discover evidence warranting the conclusion at which the jury arrived, supposing them to have proceeded on the ground of undue influence.

That Mr. Colclough might, without any undue influence
* 50 * operating on his mind, desire to make a will, giving every thing to his wife, is a proposition which cannot be controverted. She had been the partner of his life for twenty-four years. He had no children. His nearest relative was a first cousin of his father, with whom, from whatever cause, he had never had more than slight and casual intercourse. His heir pre-

sumptive was a second cousin, of whose very existence he does not appear to have been aware, being the daughter of another and elder first cousin of his father, who had died very many years previously. That he should in these circumstances wish to give every thing to his wife could surely afford no ground for surprise; and one mode, therefore, of looking at this subject is, to consider whether, supposing him, without the exercise of any sinister influence, to have entertained such a wish, his conduct would have been that which, according to the evidence, he in fact pursued.

Supposing, then, that Mr. Colclough on the 6th day of August, 1842, being, as I assume he was, sound in mind, though very infirm in body, entertained the wish to give every thing to his wife, what is the course which, as a reasonable man, he would be likely to pursue? He would surely send for his solicitor, and, in the absence of his wife, give him the necessary instructions, and when the will was prepared he would execute it in the presence only of his solicitor and some other disinterested witness, for which purpose no one would be more fit than his medical attendant. Now this is precisely the course which he did take. And the burthen of proof at the trial was therefore on the respondent to show, that though what was done bore the semblance of being the voluntary act of Mr. Colclough, yet it was an act which he was induced to perform under the influence of terror or fraud.

Now, my Lords, I look in vain for any such evidence.

*The most I can find, if indeed that can be found, is evidence to show that the act done was consistent with the hypothesis of undue influence; that the instrument, though apparently the expression of his genuine will, might in truth have been executed only in compliance with the threats or commands of his wife, or that he had been led to execute it by unfounded prejudices artfully instilled into or cherished in his mind by his wife against those who would otherwise have been the probable objects of his bounty. *51

But in order to set aside the will of a person of sound mind, it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence. It must be shown that they are inconsistent with a contrary hypothesis. Can it be truly said that there is any such inconsistency here?

The undue influence must be an influence exercised in relation to the will itself, not an influence in relation to other matters or transactions. But this principle must not be carried too far. Where a jury sees that at and near the time when the will sought to be impeached was executed, the alleged testator was, in other important transactions, so under the influence of the person benefited by the will, that as to them he was not a free agent, but was acting under undue control, the circumstances may be such as fairly to warrant the conclusion, even in the absence of evidence bearing directly on the execution of the will, that in regard to that also the same undue influence was exercised. But even allowing the utmost latitude in the application of this principle, I feel compelled to say that I do not discover the proof of any thing sufficient to show undue influence in the obtaining of this will.

That Mr. Colclough did not execute it under actual duress *52 or coercion is certain. The only persons who were *witnesses to the execution were Mr. Colclough's solicitor and medical attendant; and their testimony excludes the notion of any thing like actual force or violence having been made use of to control him. There is no evidence to show that his wife knew that he was making his will. Several of the servants, indeed, speak to the general conduct of his wife as having been of a violent and overbearing character towards him. But this, even supposing them to have had the means of forming a just opinion as to Mrs. Colclough's conduct, is clearly insufficient to prove actual coercion in the particular act of making the will, which was certainly made and executed by Mr. Colclough apart from his wife, and when she, being absent, could not, even if she wished it, force him to do what he was unwilling to do. The question is, whether the evidence shows that though not under actual duress or coercion, he would not have executed the will but from fear of the consequences which might result to him if she should discover that he had given his property to any but herself. Assuming that a will so obtained might be set aside as made by coercion, the testimony of the servants here is totally insufficient to prove such a case.

The only evidence tending to show that the mode in which Mr. Colclough might dispose of his property by will had ever been a subject of consideration with his wife, is that of Mr. Williamson, a gentleman resident at Cheltenham, and who, at the instance of

Mr. Sarsfield Colclough, called at Boteler House in October, 1841. He was first shown into the room where Mr. Colclough was alone. He says Mr. Colclough received him most courteously, and conversed with him for ten or twenty minutes, explaining the grounds of his quarrel with Sarsfield Colclough and his family. The conversation was, he says, interrupted by Mrs. Colclough, who came into the room in a commanding * manner, and abruptly * 53 told Mr. Colclough he was wanted out, upon which he left the room, and did not return. She then had a conversation with the witness on the subject of Sarsfield Colclough and his family, in the course of which she said she would take care that neither he nor his family should benefit by Mr. Colclough. This was in October, 1841, above nine months before the will was executed. After that time there is no evidence that the will was ever alluded to by Mrs. Colclough, nor is there evidence of control of any kind exercised by her, except the very doubtful testimony of servants, capable of easy explanation if we attend to the relative position of the parties, and which was not brought forward for many years after Mr. Colclough's death.

I confess, therefore, that I feel very great difficulty in understanding how this will can be impeached on the ground of coercion.

But is there any stronger evidence to show that it was obtained by fraud? i. e. defining fraud with reference to the circumstances of this case; is there any evidence to show that in order to induce Mr. Colclough to make this or some similar will, Mrs. Colclough represented to him matters to the prejudice of Sarsfield Colclough and his family which she knew or believed to be false? or that, knowing him to entertain prejudices against his relatives resting on no foundation, she contrived by force or artifice to prevent any intercourse with them, fearing that the result of any free intercourse would be to cause a reconciliation? Even assuming that such conduct would be sufficient to invalidate the will, I can discover no evidence of that sort. Mr. Williamson indeed says, that when he called at Boteler House, in October, 1841, Mrs. Colclough said she was mistress of her own house, and that Sarsfield Colclough should not be * admitted. And some of the ser- * 54 vants say that she ordered them not to let in any of Mr. Colclough's family. Assuming all this to be true, the question is, whether this was done contrary to, or in conformity with, the

wishes of Mr. Colclough. On this point there is no conflict of testimony. When Sarsfield tried to obtain admittance at Boteler House, Mr. Colclough, on the 6th of October, 1841, wrote him a harsh unfeeling letter, positively declining ever to have any intercourse with him, and stating reasons for the resolution he had thus taken. Whether those reasons were well founded does not appear to me material. If the letter was the genuine expression of what the writer believed, it shows clearly that the exclusion of Sarsfield was at his express desire. But it was contended that this letter, and one to the same effect written a week afterwards, must have been written by him at the dictation, or under the control, of his wife, and that the ground of his violent hostility to Sarsfield and his family must have been the result of unfounded prejudices artfully instilled into his mind by his wife. What proof is there of this? I can discover none. On the contrary, it appears that four days after the date of the first of the two letters, namely, on the 10th of October, Mr. Colclough wrote to Mr. Kennedy, his agent in Ireland, informing him that Sarsfield had called, but had been denied admittance, and that he, Mr. Colclough, had written refusing all communication; and in this letter he alludes to the difficulty of getting the rent due from Sarsfield's son, and urges Kennedy to act promptly and regularly in enforcing payment. One of the grounds of the unfriendly feeling entertained by Mr. Colclough towards Sarsfield and his family, and alluded to in the letter of the 6th of October was, that his wife had been (to adopt the expression used in the letter) arrested in Grafton Street for * 55 articles bought by his, Sarsfield's, * family in her name.

By the word "arrested," however, it is clear to me that he did not mean that she had been arrested by process of law, but only that she had been stopped when getting into or out of her carriage, the word "arrested," as it was contended, and probably correctly contended at the bar, having been used by him for the French word *arrêté* [stopped]; Mr. Colclough's long residence in France having familiarized him with the language of that country. Sarsfield Colclough answered the letter of the 6th of October by an indignant denial of the charges it contained, including that of the arrest of Mrs. Colclough; and Mr. Colclough, in his second letter, after reiterating the charges contained in the first letter, and averring that they were true, reminded Sarsfield that he had actually come over to Tintern (Mr. Colclough's then

residence), and apologized for what had happened in Grafton Street.

I allude to all this only for the purpose of showing that Mr. Colclough had, or thought he had, good grounds for entertaining very unfriendly feelings towards his family. And the suggestion that all these causes of aversion had no foundation in fact, but owed their existence to the artful contrivances of Mrs. Colclough, is a suggestion in support of which there is not, in my opinion, a tittle of evidence.

On these grounds, my Lords, I think that the verdict is one with which the Lord Chancellor ought not to have been satisfied, considering that it was to bind the inheritance for ever, but that he ought to have directed a new trial. I do not question the position that the Court of Chancery may, and often ought to, feel itself bound by a single verdict, where there has been no misdirection on the part of the Judge. But if it is meant to be said that, in the absence of misdirection, the Court is not at liberty to say on the trial of an issue *devisavit vel non*, as on the trial * of other * 56 issues, that its conscience is not satisfied, and therefore to direct a further trial, that is a proposition to which I cannot accede. No doubt, in deciding whether a particular instrument is the last will of the person by whom it purports to have been made, the verdict of the jury must in the end prevail. But there is no rule which compels the Court to rest satisfied with a single verdict. The evidence may appear to the Court to fall so far short of warranting the conclusion at which the jurors arrived as to lead to the belief that, however correctly directed, they could not have understood the case.

The question how the Court ought in such cases to act is a question of degree. It would not be right to direct a new trial merely because the verdict is not that which the Judge thinks he would himself have given. If he sees that the question is one of grave doubt,—one on which different minds might come to different conclusions,—that the facts were all put fairly to the jurors, so that it must be assumed that they fully understood them,—that there was no misdirection,—and that the Judge properly explained to them the points on which they were to decide,—then the Court directing the issue would pause before it would order a new trial. But I cannot feel satisfied that in this case the facts were so put to the jurors as that they could have fully under

stood what their duty was, — that they distinctly understood the principles by which they were bound to be guided in delivering their verdict.

The learned Judge who tried the cause correctly told the jury (according to the report of his charge printed in the respondents' appendix), that if they believed the testimony of Dr. Fortnam and Mr. Williams, the will was in point of form and execution a good will; but he then went on to say that it would be for the jury to declare whether, under all the circumstances of the * 57 case, the instrument in question * contained the true, unbiased, and unfettered will of the testator; whether he intended what he signed; whether it was his intention to give the property to his wife; and he added that if there was no suppression of facts, no false statement of facts relative to the will he was executing, nothing which might have misled him practised by his wife, then the will must prevail.

My Lords, from that direction I should not have been disposed to dissent, if the learned Judge had gone on to say that it must be presumed to be the testator's genuine will, unless those who contested it could point to evidence showing what was the suppression, or what the false statement, of facts, relied on as having induced the execution of the will. I am unable to discover evidence tending to show that such suppression or falsehood existed; and I think it highly probable, notwithstanding the caution which the learned Judge in other passages of his charge most properly and forcibly urged upon them, that they proceeded in their verdict on mere suspicion founded on the vague and unsatisfactory evidence of some of the witnesses, principally servants, as to the overbearing conduct of Mrs. Colclough at previous times. That a single verdict, resting on such evidence, ought to have satisfied the Court, is a proposition to which I cannot assent.

The learned Judge at the trial did not adopt the course of reading over to the jury the evidence which had been given. He said, according to the report of his charge as printed by the respondent: "It is not my object, and never has been, to weary a jury by reading over to them a mass of evidence, by repeating that which they have heard so much better from the mouths of the witnesses. It is far better to attend to the evidence as it goes on, to judge of the manner and demeanour of the witnesses. Their credit is * 58 * exclusively for you, and it has always struck me that the

great benefit to be derived from observing in what manner the witness conducts himself when giving evidence, and his demeanour, is in a great degree counteracted by reading over notes, which cannot give the advantage of that instruction which the law has extended to a jury for their guidance ; and, therefore, gentlemen, I always desire that the fullest means of understanding that evidence should be afforded to a jury, and that they should give it such an amount of attention as you have done in this case."

Of the wisdom of that course, that is, of not reading over *in extenso* what the jury had previously heard from the mouths of the witnesses, I have, as a general rule, no doubt. But I must observe that in a case like this, where the trial had occupied five days, and where great danger existed that the jurymen's recollection of the witnesses might not be distinct, especially as to the dates of matters long past, and where the evidence was in great measure directed not to facts properly so called, but to inferences to be drawn from the general observation by servants of the conduct and demeanour of their master and mistress, I cannot but think it would have been useful if the attention of the jury had been called to the station in life of the different witnesses, with reference, as well to their probable ability to recollect accurately facts after a lapse of many years, as also to their probable means of forming a judgment on those matters to which they spoke, which were rather deductions from other facts than strictly themselves facts, — such as the state of Mr. Colclough's mind, and his being or not being in a position to act freely from the control of his wife. I think further, that it would have been useful to point out the dates of some of the facts in evidence, in reference to their bearing on the only question ultimately to be decided, namely, the *ques- * 59
tion whether Mr. Colclough was, on the 6th of August, 1842, able to act, and did act, free from the control of his wife.

I do not say that if, in other respects, the verdict had been satisfactory, these considerations should have induced the Court of Chancery to direct a new trial. But I own that the absence of any direction on these heads has appeared to me to make the verdict less satisfactory than it would have been if the attention of the jury had been distinctly called to them.

On the grounds, therefore, which I have pointed out, I am of opinion that the Lord Chancellor of Ireland was wrong in refusing the motion for a new trial. The consequence is, that the order of

the 18th April, 1853, refusing the new trial, must be discharged, and the cause must be remitted back to Ireland, with a declaration that a new trial ought to have been ordered.

My opinion, my Lords, rests on the grounds I have adverted to, and not on the affidavits filed on the occasion of the motion for a new trial, and I only advert to them for the purpose of saying that their effect is not to alter, in any respect, the view I have taken of what the justice of the case requires.

With respect to what has been done subsequently to that date, of course the decree on further directions, and the subsequent orders, must fall to the ground, subject, however, to what I am about to state. It appears that the Master, proceeding under the decree, found that there was due from Mrs. Boyse, the appellant, on account of the rents and profits received by her, a sum of 21,961*l.* 19*s.* 10*d.* And by an order dated 19th June, 1854, Mrs. Boyse was ordered to pay that sum to the respondents. But in

consequence of the pendency of the appeal, that order was
 * 60 * afterwards varied by an order dated 5th July, 1854, whereby it was ordered, that on Mrs. Boyse, the appellant, investing the sum of 21,961*l.* 19*s.* 10*d.* in the purchase of three and a quarter per cents., and transferring the same into Court to abide the final result of the causes, all further proceedings under the order of 19th June, 1854, should be stayed. Mrs. Boyse, pursuant to the order of the 5th July, 1854, invested that sum in the purchase of three and a quarter per cent. Bank annuities, and transferred the same into Court. There is a supplemental appeal against the order directing payment of that sum, and, in strictness, that order ought to fall with the decree and orders which preceded it. But I think that, considering that there has been a verdict against the appellant, it will not be unreasonable to retain the Bank annuities in Court without prejudice, until the result of the new trial is ascertained.

It was said at the bar that some of the witnesses had died since the trial. If that be so, the Court of Chancery may, of course, give the usual directions for reading, on the new trial, the depositions taken in the Court of Chancery. And if, on the application of either party, the Court should think any other special directions necessary, as to directing the trial to take place elsewhere than at Wexford, or as to the admission of the Judge's notes of evidence where the presence of any of the former witnesses cannot be ob-

tained, or on any other subject, the Court below will be fully competent to do justice on all such matters.

It only therefore remains for me to move your Lordships, in conformity with what I have stated to be my opinion as to what justice requires. And I shall, therefore, move your Lordships that the order of the Lord Chancellor of Ireland refusing the new trial, and the subsequent orders (except the order under which the money was brought into Court) * shall be reversed, and that * 61 the cause shall be remitted back to Ireland with a declaration that there ought to be a new trial, with such special directions (if any) as the Lord Chancellor may deem it proper to make.

Orders and decree reversed, with declaration and remit.

Lords' Journals, 13th March, 1857.

GREY v. PEARSON.

1857. March 5, 6, 9, 16.

JOHN GREY and others, *Appellants*.

WILLIAM PEARSON and others, *Respondents*.

Will. Estates Tail. Contingencies. Ultimate Limitation. "Die under Twenty-one, and without Issue."

A testator who was possessed of two estates, S. and H., devised them to trustees, to pay debts, legacies, and annuities, "and subject to the trusts aforesaid, all the said premises hereinbefore devised shall be in trust for my grandson Robert W. and the heirs of his body; but in case he shall die under the age of twenty-one years, and without issue, my estate at H. (subject to the trusts hereinbefore respectively declared) shall be in trust for my granddaughter Ann W. and the heirs of her body; but in case she shall die under the age of twenty-one years, and without issue, the last-mentioned premises shall be upon such and the same trusts as are hereinafter declared concerning my estate at S. And I declare and direct, that if my said grandson, Robert W. shall die under the age of twenty-one and without issue," the trustees were to stand seised of S. on trust, to pay the rents and profits to the use of the testator's son Richard W., and his wife, for life "and subject to the trusts hereinbefore thereof declared, the estate at S. shall be in trust for" the family D. in fee. The trustees were to raise during the minority of Robert and Ann money for their maintenance. The grandson Robert W. attained twenty-one, but died

without issue; the granddaughter Ann W. also attained twenty-one, but died without issue.

Held (Lord St. Leonards *dissentiente*). First. The words must be read in their ordinary sense as written.¹ The first limitation over depended on the double event of Robert dying under twenty-one, and without issue, which not having happened, the limitation over did not take effect, but the estates descended to Richard, the son and heir at law of the testator, and through him to Robert, as his heir at law.

* 62 * Secondly. On Robert attaining twenty-one, the equitable remainder in fee of the S. estate, limited to the D. family, took effect in possession; but the ultimate limitation to that family only operated on the S., but not on the H. estate.

Per LORD ST. LEONARDS. — First. The testator did not intend to die intestate as to either of his estates. A change might be made in the words of the will to give effect to his real intention. The first gift was in tail; the limitation over depended on Robert dying without issue, and was perfectly good as a remainder.

Secondly. The remainder in fee to the D. family did not depend on the previous contingencies taking effect; but was an ultimate devise of all the testator's remaining interest in the estates, so as wholly to exclude his heir at law.

RICHARD WATSON, of Stainton in Cleveland, in the county of York, by his last will, dated 17th April, 1817, duly executed and attested, after directing the payment of several annuities, gave his freehold dwelling-house, &c. at Stainton, and his freehold farm there in the occupation of John Sherwood, and six freehold cottages there, and his freehold dwelling-house, &c. and farm at Hemlington,² in the occupation of John Sherwood, to trustees on trusts, to raise annuities for different persons, and a sum of 2000*l.* for the benefit of his granddaughter. The will then proceeded thus, “and, subject to the trusts aforesaid, all the said premises hereinbefore devised shall be in trust for my grandson, Robert Watson, and the heirs of his body; but in case he shall die under the age of twenty-one years, and without issue, my said messuage or dwelling-house and farm at Hemlington aforesaid, and my said six messuages or cottages at Stainton aforesaid (subject to the trusts hereinbefore thereof respectively declared), shall be in trust for my said granddaughter, Ann Watson, and the heirs of her body; but in case she shall die under the age of twenty-one

¹ *Abbott v. Middleton*, 7 H. L. Cas. 71; *Thellusson v. Rendlesham*, 7 H. L. Cas. 459; *Wing v. Angrave*, 8 H. L. Cas. 215; *West v. Lawday*, 11 H. L. Cas. 377.

² These two properties were for convenience' sake called in the argument “the Stainton estate” and “the Hemlington estate.”

years, and without issue, the said last-mentioned premises * shall be upon such and the same trusts as are hereinafter * 63 declared concerning my said messuage or dwelling-house and farm at Stainton aforesaid. And I declare and direct, that if my said grandson, Robert Watson, shall die under the age of twenty-one years, and without issue, then and in that case the trustees, their heirs, &c. shall stand and be seised of my said messuage or dwelling-house at Stainton aforesaid, now in my own occupation, and the said farm at Stainton aforesaid, now in the occupation of the said John Sherwood, upon the trusts following, that is to say, in trust to pay the rents, issues, and profits of the same premises to or for the use of my son, Richard Watson, for and during his natural life, &c. and from and after his decease, in trust to pay the same rents, &c. unto my said daughter-in-law, Mary Watson, during her life, and subject to the trusts hereinbefore thereof declared, the same messuage and farm at Stainton aforesaid, shall be in trust for my grandson, William Darnell, and the said Robert Watson Darnell, and my granddaughter, Elizabeth Darnell, in equal shares, as tenants in common, their respective heirs and assigns for ever." The trustees were also directed to raise, during the minority of the testator's grandchildren, Robert and Ann Watson, such yearly sums as they should judge proper, these sums to be applied immediately by the trustees, or paid into the hands of the testator's daughter-in-law, Mary Watson, for that purpose.

The testator had been twice married. By his first wife he had one daughter, Margaret, who married William Darnell, and had issue, William Darnell, Robert Watson Darnell, and Elizabeth Darnell. By his second wife the testator had one son, Richard Watson, who was married, and had one son, Robert Watson, and one daughter, Ann Watson. * The testator died in * 64 August, 1817, and left his son, Richard Watson, his heir at law ; and Robert Watson and Ann Watson, his son's only children ; his daughter-in-law, Mary Watson (since deceased) ; and his grandchildren the three Darnells, all named in his will, him surviving.

In 1829, through the deaths of other trustees, W. Rutter became the sole trustee.

All the annuitants died, and the sum of 1000*l.*, part of the 2000*l.*, was raised for the granddaughter, Ann Watson.

The testator's grandson, Robert Watson, attained twenty-one in May, 1829, and entered into possession of the rents and profits of the devised premises, and continued so up to the time of his death, without taking any step to bar his equitable estate tail therein. His father died in 1844, and he died in April, 1848, without issue, having, by his will, devised all his real and personal estate charged with the payment of his debts, to his sister, Ann Watson, her heirs, &c.

Ann Watson attained twenty-one, and proved the will of her brother, Robert Watson, and entered into possession of the premises, but never did any act to bar the estates tail created by the will of 1817. She claimed to be entitled to an equitable estate in fee in the premises, as devisee of her brother, Robert Watson, the heir at law of his father, Richard Watson, the heir at law of the testator, Richard Watson, upon the ground that the equitable reversion in fee in the hereditaments and premises expectant upon the estate tail of the said Robert Watson therein, which had not been barred, was, by the event of Robert Watson attaining his age of twenty-one years, undisposed of by the will of 1817, and had therefore descended, through Richard Watson, to his son and heir, Robert. Ann Watson continued in the possession * 65 sion * or receipt of the rents and profits of the said hereditaments and premises up to her death, which happened on 7th February, 1849, without her having been married. By her will, dated 25th November, 1848, after giving various legacies, she devised all her real estate, whatsoever and wheresoever, unto and to the use of William Pearson and William Hill (since deceased), their heirs and assigns, upon certain trusts, and, after satisfying the same, for their own benefit, in equal shares.

The testator's grandson, William Darnell, died in December, 1849, having by his will, dated 13th August, 1846, devised all his real estate to the appellants.

On the 20th of April, 1850, Pearson and Hill filed their bill as devisees of Ann Watson, deceased, against William Rutter, as surviving trustee under the will of Richard Watson, made in 1817, and against Grey and the other appellant, as devisees under the will of William Darnell, stating as hereinbefore set forth; and the bill prayed, that it might be declared that, according to the true construction of the will of 1817, the limitations therein contained to take effect in the event of the death of Robert Watson, the

testator's grandson, under the age of twenty-one years, and without issue, became inoperative upon the said Robert Watson attaining his age of twenty-one years; and that William Rutter was a trustee of the fee simple of the said premises for the plaintiffs, as devisees of Ann Watson, and that he might be ordered to convey to them.

The cause was heard before Vice-Chancellor Turner, who was of opinion that the grandson and granddaughter, named as tenants in tail, having each died without issue, the ultimate limitation took effect, and the Darnells were entitled. He therefore made a decree dismissing the plaintiffs' bill, being also of opinion that the last clause of the will, "subject to the trusts hereinbefore thereof declared," overrode all the *previous limitations, * 66 and that, as Robert Watson had not barred the estate tail, both the estates went in accordance with that devise.

This decree was taken by appeal to the Lord Chancellor, who, on the 11th June, 1853,¹ was pleased to vary the order of the Vice-Chancellor, and to decree, as to the Hemlington estate, that according to the true construction of the will, upon Robert Watson attaining twenty-one, the equitable estate tail in remainder limited to Ann Watson, in case the said Robert Watson should die under the age of twenty-one years, and without issue, became incapable of taking effect; and that upon Ann Watson attaining twenty-one the trusts declared of the Hemlington estate, in case the said Ann Watson should die under the age of twenty-one years, and without issue, became incapable of taking effect; and that the equitable reversion in fee in that estate became, in consequence, undisposed of by the will, and descended upon Richard Watson, the son and heir at law of the testator, and, through Richard Watson, descended to his son Robert, and was by him devised to Ann; and that Rutter was a trustee of the Hemlington estate for Pearson and Hill, as her devisees. And, as to the Stainton estate, that, according to the true construction of the will, upon Robert Watson attaining twenty-one, the equitable estates for life in remainder limited to Richard Watson, and his wife, Mary Watson, in case Robert Watson should die under twenty-one years, and without issue, became incapable of taking effect; and that, upon the death of Robert Watson without issue, the equitable estate in fee in remainder limited to the Darnells, as

¹ 3 De G., M. & G. 398, nom. *Pearson v. Rutter*.

tenants in common, took effect in possession, as devisees in trust, according to their respective shares and interests therein.

* 67 * This was an appeal against so much of the decree as declared the intestacy with respect to the Hemlington estate.¹

Mr. Walker and *Mr. Malins* (with whom was *Mr. Robson*) for the appellants. — The sole question on this appeal relates to the decision as to the Hemlington estate. The respondents claim under the heir at law of the testator, and contend that, in the events that happened, there was an intestacy as to that part of the property. The appellants contend that the ultimate limitation in the will of 1817 continued in force, and took effect as to both estates on the death of the granddaughter without issue. The question on the construction of the will depends on the authority of the decision of Lord Hardwicke in *Brownsword v. Edwards*.² The first gift there was to trustees to receive the rents and profits till J. B. should attain twenty-one, and “if he should live to attain twenty-one, or have issue, then to J. B. and the heirs of his body; but if J. B. should happen to die before twenty-one, and without issue,” to S. B. in the same manner, and for want of such issue to his own right heirs. J. B. attained twenty-one, but died without issue. Lord Hardwicke held, that this was a limitation to J. B. and to S. B. in tail, and that, on the death of J. B., after twenty-one without issue, the estate went over according to the limitations. That case recognises the power of the Courts to transpose and alter a word in a will, so as to give effect to * 68 the general intent of a * testator; but it is an error to suppose that the decision there went on that ground, it proceeded on the ground that an estate tail was vested in J. B. at twenty-one, and that the words “die without issue” went through the whole devise, and that on his so dying after twenty-one, when the estate was vested in him, it went by way of remainder. That case entirely governs the present. Here, as there, the first estate given was an estate tail. *Luxford v. Cheeke*,³ *Tuck v. Frencham*,⁴ *Spal-*

¹ Both parties objected to the decree; the appellants, as it deprived them of the Hemlington estate, and the respondents, as it did not award them the Stainton estate. But the appeal was only brought in respect of the decision as to the Hemlington estate.

² 2 Vez. Sen. 243–247.

⁴ Moore, 13, pl. 50.

³ 3 Lev. 125.

ding v. Spalding.¹ The ultimate devise over of the Hemlington estate being preceded by estates tail was a limitation after the failure of those estates, and took effect accordingly. The general effect of the testator's will shows clearly that such was his intention. On the death, without issue, first of Robert and then of Ann, the ultimate limitation to the Darnells was to come into operation. To secure that result the word "and" in the will must, if necessary, be read "or," *Maberly v. Strode*,² for the testator intended that the death without issue of his two grandchildren should be the contingency on the happening of which effect should be given to the succeeding estate. To adopt a different construction would be to create an intestacy, and so vest the absolute ownership in the testator's son Richard, though the testator had expressly limited his interest to a life interest in one part only. It is clear that the testator never intended such a result. *Fairfield v. Morgan*³ applies, so far as it shows that the Courts will transpose and even alter words, in order to give effect to the general intention of the testator: in other respects, it is distinguishable as being a case where the gift was in fee and not in tail. But *Woodward v. Glasbrook*⁴ * is in point. *69 There the words were, "if any of my children shall die before twenty-one, or unmarried, the share of him so dying shall go over to the survivors," and the construction put upon it was that which preserved the limitations, for the share was held to go over on the death of the one son unmarried, though he had long before attained twenty-one. There the words "die before twenty-

¹ Cro. Car. 185.

² 2 New Rep. 38.

³ 3 Ves. 450.

⁴ 2 Vern. 388. This case is reported by Vernon as if occurring in chancery. Mr. Raithby's edition of Vernon (1828) throws a doubt on the report by appending a note, which states that "no opinion or decree of this date appears. The Court ordered a case upon the will to be stated, in case the parties or their counsel could not agree to the same. Reg. Lib. 1700, B. fol. 90. No further entry appears." The explanation is probably this, that a suit was instituted in chancery, and an ejectment also tried, and the opinion expressed by Lord Chief Justice Holt on the trial was introduced into the report of the case when it was heard before the Lord Keeper, who himself expressed no opinion, but gave liberty to state a case. The date of the case in the report is November, 1700. Lord Chief Justice Holt could not then have decided it in Chancery, for he was a Commissioner of the Great Seal only from the 5th to the 21st May, 1700, when Sir Nathan Wright was appointed Lord Keeper. 1 Ld. Raym. 566, Memorandum.

one" were not treated as the operative words of the condition, but the dying unmarried was held to be that event which gave effect to the succeeding estate. In the same manner, here the words "die under twenty-one" are immaterial, except so far as connected with the words "*and* without issue"; they protect the issue of Robert, should he die under twenty-one, leaving issue.

The most recent and most fully considered case on this subject is that of *Mortimer v. Hartley*.¹ There the will, which was divided into clauses, appointed executors and trustees, and the 11th clause proceeded thus: 11. "I will that my son John, having attained to twenty-five years of age, be let into possession of all my property, real and personal, which remains, on this express condition, * 70 &c." * 12. "If it should happen that my son John die without leaving lawful issue, it is my will that Ann have his share, subject to the same restrictions, &c." 13. "If it should please God to take away both Ann and John under age, or without leaving any lawful issue, I give to my brother Joseph Westerman and his heirs for ever all those cottages, &c. built on the waste, &c." The 14th article contained a general devise, on the failure of the preceding limitations, to the plaintiff. Ann died an infant, leaving her brother John her heir at law. John attained twenty-five, was let into possession, but did nothing to bar the estate tail, married, had three children, and died in 1842. One of the children died in his lifetime, the second two years, and the third four years afterwards, all infants and without issue. Vice-Chancellor Knight Bruce sent this will to the Court of Common Pleas, where it was held that John took an estate in fee, and the word "or" was read "and." If the decision of that Court was right, that case would not apply to the present, as the devise was held to be in fee. The Vice-Chancellor, not being satisfied with the decision of the Court of Common Pleas, sent the case to the Court of Exchequer, where, in an elaborate judgment delivered by Mr. Baron Parke, that Court made no change in the words, but declared the estate to John to be an estate tail, and so gave effect to all the limitations. The case then again came before the Vice-Chancellor, who was "of opinion that John was tenant in tail; that the estate to Ann was limited in a similar manner," and that, on the failure of these, "the limitations over in the thirteenth and fourteenth clauses took effect." In coming to this decision the

¹ 6 C. B. 819, 6 Exch. 47, 3 De G. & S. 316.

Vice-Chancellor acted expressly on the authority of *Brownsword v. Edwards*.

[LORD ST. LEONARDS. — Was *Mortimer v. Hartley* brought to the notice of the Lord Chancellor in the Court below ?]

It was not ; all the reports of it had not then appeared.

* So far the cases support *Brownsword v. Edwards*. *71
What is there to impeach it ? There is the case of *Doe d. Usher v. Jessep*.¹ But it is submitted that either that case proceeded on a misconception of *Brownsword v. Edwards*, or was wrongly decided. The devise there was to trustees for A. (then under age) “and the heirs of his body,” and “if he die before twenty-one, and without issue,” then over to other relations, and ultimately to the testator’s own right heirs. A. attained twenty-one, and died a few years afterwards without issue, and without having suffered a recovery of the freehold property devised by the will. The Court held that A. having attained twenty-one, the limitations over did not take effect, as, by the natural sense of the word “and,” they were made to depend on the happening of both events, i. e. the son dying before twenty-one, and without issue. That decision cannot be supported. It disregards the fact that the estate given was an estate tail ; it was decided hastily, and not after full argument, and it seems to have proceeded entirely on the question, whether the Court could there change one word for another, as to which Lord Hardwicke’s reasoning in the previous case of *Brownsword v. Edwards* appears to have been quite misapprehended. By the construction thus adopted, all the limitations which were limitations in remainder were defeated. That case has not met with the approval of the profession. In *Fingal v. Blake*,² Lord Chancellor Hart, speaking of it, said : “In *Usher v. Jessep*, I think they went a tremendous length. I should have thought differently from the Judges who decided that case.” In *Malcolm v. Taylor*,³ Lord Chancellor Brougham expressly recognised *Brownsword v. Edwards*, and speaking of *Doe d. Usher v. Jessep*, said : “The Court of King’s Bench has in that case certainly * gone against, though it cannot be said to have overruled, *72 the decision of Lord Hardwicke.” The decision here proceeded on the authority of *Doe v. Jessep*, and cannot, therefore, be supported.

¹ 12 East, 288.

² 2 Russ. & M. 416, 447.

³ 2 Molloy, 50, 66.

Then as to the other point. Both estates go together under the ultimate limitation in the will, which overrides the whole of the previous trusts. The testator did not intend to make any permanent distinction between the two estates, although for a certain purpose he interrupted their union for a time. When that purpose was answered, he intended them to be reunited, and to descend together. The Helmington estate is not affected by any contingency; it is a vested remainder: *Lethieullier v. Tracy*,¹ *Bradford v. Foley*,² *Doe d. Lees v. Ford*,³ *Garde v. Garde*,⁴ *Quicke v. Leach*,⁵ *Key v. Key*,⁶ and *Sheffield v. Coventry*.⁷ If there are any words which appear to engraft any contingency on the ultimate limitation, the general intention of the will must be looked at, and then it will be seen that that intent was to create estates tail in successive remainders, not affected by any contingency. The words "subject to the trusts hereinafter declared of the Stainton estate," introduce all those trusts into the part of the will which relates to the Helmington estate, and that estate, after those trusts are satisfied, goes with the other in regular course of remainder.

Mr. Rolt and *Mr. Faber* for the respondents. — If the words of this devise are taken by themselves, the construction to be
 * 73 put on them is perfectly plain. The * words are, that if the grandson, Robert Watson, shall "die under twenty-one, and without issue," the estate is to go over to the granddaughter. Both the events must happen as here described, in order that the limitation to the granddaughter should take effect. To read "and" as "or," which is necessary for the construction of the other side, would be to disinherit the grandson's issue, should he die under twenty-one leaving issue. It is impossible that such could have been the intention of the testator. The appellants seek, in substance, to introduce the words "at any time" before the words "without issue." There can be no justification for that. To introduce those words would be equivalent to striking out the words "die under twenty-one," and, in truth, the whole argument on the other side goes on the presumption that these words do not exist in the will. It is admitted, on the other side, that a testator's inten-

¹ 3 Atk. 774, Amb. 204.

² Dougl. 63.

³ 2 Ellis & B. 970.

⁴ 3 Drury & War. 438.

⁵ 13 M. & W. 218.

⁶ 4 De G., M. & G. 73.

⁷ 2 De G., M. & G. 551.

tion must govern the construction of a will. The intention here is easily explainable. The testator gave an estate tail to his grandson, knowing that the grandson on arriving at twenty-one might absolutely dispose of the estate, and thus secure it to his issue, while the words "*and without issue*" being united to "*die under twenty-one*," would secure it to the issue, should he die before that age, leaving issue. In all events the issue was provided for. The words must be read as if they were "*die under twenty-one, and without having had issue.*"

It is a principle of construction not to depart from the plain words of a will, unless the general scheme of the will shall show, that to follow them will have the effect of defeating the clear intention of the testator. There is nothing of that kind here: but rather the reverse. There are some cases in which "*or*" has been read "*and*," but in those cases the special object of the change has been that of preserving the estate to the issue of the first taker. *Soulle v. *Gerrard*,¹ and *Lord Vaux's Case*,² were instances of * 74 that kind, and are explained by the necessity which, in order to effectuate the plain intention of the testator, required such a remedy. For that reason the same course was adopted in *Hellicard v. Jennings*,³ *Walsh v. Peterson*,⁴ *Fairfield v. Morgan*,⁵ *Denn v. Kemeys*,⁶ and *Right v. Day*;⁷ the decisions in the last two being expressly founded on the preceding cases. No such necessity exists here, and to change the word in this case would, as already shown, deprive the son's issue of the estate if he died before attaining twenty-one. In *Woodward v. Glasbrook*,⁸ Lord Chief Justice Holt was of opinion that though the devisee attained twenty-one, yet, as he was unmarried, the estate went over according to the limitations. There the word was "*or*," and reading the words as they stood, no time was fixed at which the dying unmarried could be made specially applicable. The limitation, therefore, which was dependent on it took effect whenever it occurred. But here the dying under twenty-one is specially expressed, and cannot be disregarded. The two cases are therefore materially different from each other. What was said by Lord Hardwicke in *Brownsword v.*

¹ Cro. Eliz. 525, S. C. nom. *Sowell v. Garret*, Moore, 422, pl. 590.

² Cro. Eliz. 269.

³ 9 East, 366.

⁴ 1 Ld. Raym. 505, Freem. 509.

⁵ 16 East, 67.

⁶ 3 Atk. 193.

⁷ 2 Vern. 388.

⁸ 2 New Rep. 38.

*Edwards*¹ was made the ground of decision in *Mortimer v. Hartley*.² That case, though relied on by the appellants, is in reality an authority for the respondents. The Court of Common Pleas³ read the word "or" as "and"; the Court of Exchequer, following

Lord Hardwicke, declined to do that, and said that the * 75 words must have their natural meaning, a * rule which the respondents contend must be followed here. Mr. Baron Parke, in delivering the judgment of the Court, distinctly declared⁴ that the opinion of Lord Hardwicke on that point was one on which the Court ought to act, and, referring to the authorities, said: "The disposition of the Court should always be to abide by the words of a will, and to read them in their ordinary grammatical sense. If we were to do so in this case, and make no alteration whatever, it is possible we may disappoint what we may conjecture to have been one intention of the testator, because it is a reasonable intention to entertain, that is, to give a benefit to the issue, if their parents should die under twenty-five, but we are sure of carrying into effect a manifest and declared intention of the testator to give the remainder over to Joseph on the determination of the estate tail. On the other hand, if we change 'or' into 'and' for the purpose of effecting the conjectured intention, to give a benefit to the issue on the death of their parents respectively under twenty-five, we defeat the clear and manifest intention to give the remainder to Joseph on failure of the issue of John and Ann, and cause an intestacy as to that remainder, a circumstance which ought to be avoided"; and thus explaining himself, he adds: "But as none of the authorities applies to an estate tail, and we have Lord Hardwicke's high authority for distinguishing such a case, we are of opinion that we ought to do so and abide by the ordinary sense of the words." We have, therefore, the opinion of the Court of Exchequer that *Brownsword v. Edwards* is not an authority for changing the words of a will, and here the first limitation is a clear estate tail to the grandson, and that is the * 76 very case in which Lord Hardwicke said, and * the Judges of the Exchequer repeat, that no such change of words can take place.

The later case of *Doe d. Usher v. Jessep*⁵ is exactly like the pres-

¹ 2 Vez. Sen. 243, 247.

⁴ 6 Exch. 61.

² 6 Exch. 47.

⁵ 12 East, 288.

³ 6 C. B. 819.

ent. There an estate tail was immediately vested in a natural son, and, "if he die before twenty-one *and* without issue," over. The son attained twenty-one, and then died without issue. The case of *Brownsword v. Edwards* was there relied on to show that the limitations over took effect, and the Court was pressed to read "and" as "or," but refused to do so, observing that the testator had given the estate over upon the happening of two events, and that the Court could not give it over upon the happening of one only, but must construe the word in its natural sense. That is a rule of construction which the greatest authorities have always approved of.

[LORD WENSLEYDALE. — It is well expressed by Mr. Justice Burton in *Warburton v. Loveland*,¹ and the rule equally applies to deeds and to statutes.]

Besides, there is no secondary nor popular sense of the word "and" which agrees with the construction now sought to be put on it by the appellants.

Then as to the second point. *Lethieullier v. Tracy*,² *Bradford v. Foley*,³ and *Sheffield v. Coventry*,⁴ and *Doe d. Lees v. Ford*,⁵ do not apply here. But *Doe d. Watson v. Shipphard*,⁶ where one contingency was held to affect all the limitations, is in point.

* [LORD ST. LEONARDS. — Suppose there had been a resid- * 77 uary devise of the real estate?]

That would of course have carried every thing, but there is no such devise here.

[LORD ST. LEONARDS. — But are not the words here equivalent to that?]

They are not. The words of subsequent trust are not to be introduced as if written in the will, unless after the words "in case she die under twenty-one, *and* without issue." Besides, the events thus described have not happened, and therefore the estates tail did not take effect.

Mr. Walker replied.

¹ 1 Huds. & Br. (Ir.) 648; and see the opinion of the Judges delivered in that case by Lord Chief Justice Tindal in this House, 2 Dow & C. 493, and in the *Sussex Peerage Case*, 11 Clark & F. 143.

² 3 Atk. 774.

³ Dougl. 63.

⁴ 2 De G., M. & G. 551.

⁵ 2 Ellis & B. 970.

⁶ Dougl. 75.

March 16.

THE LORD CHANCELLOR, after fully stating the case, and the decisions in the Courts below, said : — The question as to the Hemlington estate arises in this manner : Two estates are given, subject to certain trusts for raising annuities and legacies, and, “ subject to the trusts aforesaid, all the said premises hereinbefore devised shall be in trust for my grandson Robert Watson, and the heirs of his body ; but in case he shall die under the age of twenty-one years *and* without issue,” then to Ann in like manner.

What happened was this. Robert Watson died without issue of his body, but he did not die under the age of twenty-one years. The real and important question is, there being that condition, “ if he should die under the age of twenty-one years *and* without issue,” whether that “ and ” really is to be read according to its natural import, so as not to give the estate over unless he died both without issue and under the age of twenty-one years, or whether, he having attained twenty-one, but died without
*78 issue, the * trust over was to take effect, rejecting the words “ under the age of twenty-one years.”

Supposing this case had been unaffected by prior decisions, I conceive there could have been no doubt upon the subject, because the rule of construction, and the rule which, in modern times particularly, the Courts have always been anxiously inclined to follow, has been to adhere as rigidly as possible to the express words that are found, whether in wills or in deeds, and to give to those words their natural ordinary meaning, unless, by so doing, it appears from the context, that you are using them in a different sense from that in which the testator or the maker of the deed intended to use them, or, unless by so using them, you would be doing something which would manifestly lead to an inconsistency, which could not have been the intention of the party making the instrument.

Applying that rule to the present case, supposing it to be untouched by decisions, the question is, whether in construing that word “ and ” copulatively in its natural sense, you are doing any thing which is inconsistent with what else appears upon the face of the will, or are doing something which manifestly must be going contrary to the real objects of the testator. I confess I can see no ground whatsoever for thinking that the word “ and ” was not what the testator intended, for he gives the estates to his

grandson Robert Watson and the heirs of his body. That creates an estate tail, and all persons familiar with the subject know, and probably this testator knew, that when his grandson attained twenty-one, he would have the absolute power of disposing of the property just as he might think fit. Centuries have elapsed since it was settled that a tenant in tail has, in truth, the absolute control over the property. He may, by suffering a recovery, or, without *suffering a recovery, by doing something analogous to it, make himself the absolute owner of the property. *79 Where you give an estate to a tenant in tail in that way, it makes him substantially the absolute owner of the property. But the testator declares, that if the grandson should die under the age of twenty-one years and without issue, it shall go over. It appears to me that that was not an irrational mode of disposing of the property. I should feel at a loss, indeed I should think it impossible, to hold that that could not be what the testator intended. And, therefore, independently of authority, I should feel myself bound to adhere to the strict meaning of the words, and to say that the testator having given the estate over in the event of his grandson dying "under twenty-one, *and* without issue," inasmuch as the grandson attained twenty-one though he died without issue, there was no gift over.

But then the question is, whether this mode of construing this will has been affected by previous authorities, because there is another rule which is quite reasonable, that where words have for a long series of years obtained a well-known technical meaning, although it might not be that which, if the case had been entirely untouched by decisions, the Courts might now adopt, it would be unsafe, and it would render property insecure if we were now to depart from that meaning and apply a different rule of construction.

The cases which, by way of analogy, were mainly relied upon as authorities were cases of which there are a great many in the books, beginning with one reported in the reign of Queen Elizabeth, and found in Croke's Reports.¹ I say beginning then, though I am not clear that there *may not have been prior cases; *80 but, beginning then, the same doctrine is carried down through a variety of cases, and was ultimately approved of and

¹ Lord Vaux's Case, Cro. Eliz. 269. Soule v. Gerrard, Cro. Eliz. 525; S. C. nom. Sowell v. Garret, Moore, 422, pl. 590.

sanctioned by your Lordships' House in a well-known case, in the early part of this century, that of *Fairfield v. Morgan*.¹ That was a writ of error from Ireland. In that case the doctrine was enunciated and approved, that where a testator devises an estate so as to give the control of the fee simple to his son, or to any other person, for instance, to A. B. but if he dies under the age of twenty-one years, *or* without issue, then over, in that case the word "*or*" must have meant "*and*"; and, though it is improperly used, must be taken to have been used conjunctively and not disjunctively, because it never could have been the testator's intention, in giving an estate to a person and his heirs, to give it away from that person's issue, if he should happen to die under twenty-one leaving issue. I confess that, if that were now to be decided for the first time, I should rather have doubts upon it, whether it was not more likely to be the safe rule to adhere to the strict meaning of the words used, than to speculate upon what the testator intended. However, I only throw that out, not as meaning to cast any doubt upon the rule that where these words do occur, they must be, *primâ facie*, at least, so understood, that is to say, that if an estate is given to a person and his heirs, with a limitation over in case he dies "*under twenty-one, or without issue,*" then in that case if he dies under twenty-one, leaving issue, still it is meant that the issue should take; and if he attains twenty-one and does not have issue, still he has an estate tail. That has been the construction adopted

for the purpose of preserving the estate to the issue which
 * 81 otherwise would be defeated. The ground of that, as I * have already pointed out, is that any other construction would defeat that which must be presumed to have been the intention of the testator, and that when he gave the estate to a person and his heirs, or in a way which amounts to giving to a person and his heirs, that construction must be wrong, which, if the person died leaving issue, would take it away from that issue. And to depart from that long-established rule, and to adopt a stricter rule of construction would probably cause more evil than it would remedy, as was very ably pointed out by Lord Brougham, when he held the great seal, in the case of *Malcolm v. Taylor*.²

The question which your Lordships have now to consider is, whether there is any such well-recognised technical rule applicable to a case like the present, where the devise is not to a person and his

¹ 2 New Rep. 38.

² 2 Russ. & M. 447.

heirs, with a limitation over if he dies under twenty-one, *or* without issue; but where a testator gives an estate tail to a person, and the heirs of his body, with a limitation over if he dies under twenty-one, *and* without issue. Is there any rule of construction which says that in that case it is to go over if he does not fulfil both conditions, that is to say, if he does not die under twenty-one, *and* without issue; that it is to go over if he dies at any time without issue?

In support of the proposition that there is such a rule, reliance was placed upon the well-known case of *Brownsword v. Edwards*,¹ a case of very high authority, which was decided by Lord Chancellor Hardwicke. [His Lordship fully stated the case.] That case has often been cited, and certainly quite erroneously cited, as an authority for the proposition that Lord Hardwicke held that the word "and" was to be read as "or." That is clearly not the *ground upon which Lord Hardwicke proceeded, as is * 82 manifest from his own language. What Lord Hardwicke proceeded upon, whether correctly or not, was this. He says, this is an alternative gift; if John Brownsword attains twenty-one, *or* has issue, it is a gift to him and the heirs of his body; and then comes the alternative; if he dies under twenty-one, *and* without issue, then there is a gift to Sarah Brownsword. Now, he did not fulfil both these conditions; he did not die under twenty-one, though he died without issue. Lord Hardwicke, nevertheless, held that by implication the estate was to go over to Sarah Brownsword in any event, if he died without issue. But that was not by altering "and" into "or." For unquestionably, Lord Hardwicke never would have held that if he died under twenty-one, leaving issue, it was to go away from his issue. That never could have been his meaning, because it was an express devise to him and the heirs of his body. To make it quite clear that Lord Hardwicke did not proceed upon that ground I will read what he says, speaking of those cases in which "or" has been held to mean "and," he says: ² "If the first limitation had been in tail there would be no occasion to resort to that, but the Court would have made the construction I do now; viz., if he dies without issue before twenty-one, then over, by way of executory devise; if he dies without issue after twenty-one, when the estate had vested in him, it would go by way of remainder; because he had made

¹ 2 Vez. Sen. 243, 247.

² 2 Vez. Sen. 249.

his original devise capable of a proper remainder, in which case the Court will always construe it a remainder."

I do not know that it is necessary for me absolutely to say that,

I think, Lord Hardwicke is not in that case rightly deciding.

* 83 I confess, however, that if bound to express an opinion * upon the subject, I should be obliged to say that I do not think that is a decision founded upon correct principles; because, unquestionably, Lord Hardwicke there, though he does not change the word "and" into "or," which would not have answered his view at all, does imply that there was an intention to give a remainder in case the estate tail in the son John took effect; whereas there are no words that express such a meaning. In this case, however, that principle cannot apply, because here the words are clearly sufficient to give an absolute estate tail in the first instance, which was not the case in *Brownsword v. Edwards*. There, it may be said, that in the expression, "if he should happen to die before the age of twenty-one, and without issue," the words "before twenty-one" were not unnaturally, though perhaps unnecessarily, introduced, because the object was to provide for a contingency exactly the opposite of that which Lord Hardwicke points to; that is to say, if he died before twenty-one, and without issue, is the alternative of either attaining twenty-one or having issue. But in the present case, the words found in this will, "if he dies under the age of twenty-one years," are absolutely meaningless, unless full effect is to be given to the word "and" after the expression, "if he dies under twenty-one." The argument is, that it is to be read as, if he died without issue, whether under the age of twenty-one years or after the age of twenty-one years, so that the words "under twenty-one years," it is contended have no meaning at all. Not being called upon to say whether, upon the grounds pointed out by Lord Hardwicke, that case of *Brownsword v. Edwards* was or was not rightly decided, I shall only observe that I conceive that either it was not rightly decided, or that, if rightly, it was so decided upon principles not governing this case.

* 84 * Whether I should have felt myself warranted in adopting such a construction, if this case of *Brownsword v. Edwards* had been entirely unshaken, is a matter upon which I need not speculate, because I conceive that the precise view which I take of the law upon this subject was discussed in the case of

*Doe d. Usher v. Jessep*¹ in the Court of Queen's Bench, in the year 1810, when Lord Ellenborough presided in that Court. I confess that, to my mind, and indeed it was pretty well admitted at the bar, that the present case is undistinguishable from that case of *Doe v. Jessep*. There a devise was made to trustees in fee, "in trust to and for my natural son John and the heirs of his body lawfully issuing for ever." It was a gift in tail in the first instance. "And my will further is, that if the said John Jessep shall happen to die before he attains his age of twenty-one years, and without issue lawfully to be begotten, then I devise" it over to certain other persons, who were the claimants. The question was, whether the persons claiming upon that gift over were entitled, the facts being, as in this case, that John Jessep had attained twenty-one, but never had any issue. When the case came before the Court, *Brownsword v. Edwards* having been pressed as being directly in point, Lord Ellenborough said: "The cases certainly run very near; the only distinction seems to be, that the limitation over in *Brownsword v. Edwards* was in favour of a daughter, who, without such a construction as was there put on the word 'and,' would have been left without any provision, and here the limitation over is to other relatives." Now I think it is better not to make such nice distinctions, in order to save the necessity of saying that you go against a prior decision; and really the distinction, after all, only comes to this, that in one case it * was a gift over to collaterals, and in the other to * 85 nearer relations. That appears a distinction not to be understood, and one which does not mark a difference.

Then Lord Ellenborough goes on to say: "But is there not a rule of common sense as strong as any case can be, that words in a will are to be construed according to their natural sense, unless some obvious inconvenience or incongruity would result from so construing them. Now here the testator has used the copulative word 'and,' and has devised his estate over in case his son died before twenty-one *and* without issue, that is, if both those events happened; why, then, should we read 'and' as 'or,' and give the estate over upon the happening of one only of the events, when no inconvenience will ensue by construing the word used in its natural sense?"

That was the decision of the Court in 1810, just sixty years

¹ 12 East, 288.

after the case of *Brownword v. Edwards*. Whether the more recent case is now entirely unquestioned, I do not stop to inquire. As far as I have been able to discover, it has not been seriously questioned. It has been in force for between forty and fifty years.

When this case came before me by way of appeal, it appeared to me that either *Doe v. Jessep* overruled *Brownword v. Edwards*, or that, if not, it was by reason of there being some distinction, which same distinction exists in the present case. I thought the rule laid down in *Doe v. Jessep* a much more sensible and convenient rule than that in *Brownword v. Edwards*, and I acted upon it.

Though I have since considered the case in every point of view, and have looked to see how far subsequent authorities have at all shaken this decision, I cannot come to any other conclusion than that the decision at which I arrived is the safe and correct conclusion.

There was one case which had been decided, when the
 * 86 * present case was argued, bearing some relation to it, but it was not quoted in the argument before me, and I dare say counsel were not aware of it. On looking, however, at that case, I confess, so far from leading me to doubt the propriety of my decision, it rather confirms me. I allude to the case of *Mortimer v. Hartley*, in the Exchequer.¹ In that case there was some doubt as to what estate was meant to be given to the son John and the daughter Ann; but it was held that, by the proper construction of the will, estates tail were given, and then it was said: "If it shall please God to take away both John and Ann under age" (that was under the age of twenty-five, which the testator had fixed), "or without issue," then to Joseph Westerman. John, to whom the previous estate tail had been given, attained the age of twenty-five, and then died without issue; he had had issue, but the issue had died during his life, and it was held that the devisee over was entitled; that the word "or" must have its natural meaning. The estate was given to John and the heirs of his body; and if he died under twenty-five, or without issue, over to Joseph Westerman. The argument there was, that "or" was to be altered into "and"; and that, inasmuch as John had attained twenty-five, there was no gift over to Joseph Westerman. The Court of Exchequer, after a very elaborate argument, and after fully considering the

¹ 6 Exch. 47.

case, was of opinion that the natural meaning was to be given to the word "or," and that the rule as to construing "or" as meaning "and" could not hold universally. The testator having said, I give the estate to John and the heirs of his body ; but if he dies under twenty-five, *or* without issue, it is to be given over, and he having died without issue, the Court held that that gift over was therefore to take effect. I confess I do not see, though that case was pressed upon us by Mr. Walker, in * his able argument at * 87 your Lordships' bar, as an authority, that it would have shaken me in the opinion I have formed. I confess it does not at all produce that effect ; on the other hand, it rather appears to me to confirm the view I have taken, as showing that the ordinary meaning of words is, if possible, to be adhered to.

My Lords, it remains only to advert to another argument ; the ground, I believe, on which Vice-Chancellor Turner decided the case. I have not seen a report of the argument before Vice-Chancellor Turner ; but I think it was stated to me in the Court of Chancery that Vice-Chancellor Turner took the same view that I did as to the general construction of the devise, though not as to the Hemlington estate.

[*Mr. Walker.* — He did not give any distinct opinion upon the point as to the Hemlington estate ; he merely said that there might be great difficulty as to that.]

THE LORD CHANCELLOR. — He was of opinion that *quâcunque viâ datâ* this estate was to go over to the ultimate devisees, for that there was, as to the estate of Stainton, a direction that in case the grandson died under the age of twenty-one years there was to be a life interest given to his parents, which never took effect, because that life interest expired in the lifetime of the grandson ; and then there was a direction given, and, "subject to the trusts hereinbefore thereof declared, the said messuage and farm at Stainton aforesaid shall be in trust for" the Darnells, the persons now litigating this case. Then, in the devise of Hemlington, there was a declaration that if Robert, the grandson, died under twenty-one, *and* without issue, it was to go to Ann and the heirs of her body. But that, in case she should die under twenty-one, *and* without issue, then the same trusts as are hereinafter declared as to Stainton shall take effect as to Hemlington. Now, Vice-Chancellor Turner * thought that that carried the Hemlington estate as * 88 well as the Stainton estate. I had occasion to consider this

point when the case was before me, and I have considered it since; but I cannot see how that ultimate limitation as to Stainton can by any possibility be applicable to Hemlington, because the limitations as to Stainton are only to be applied to Hemlington in case Robert and Ann both die under the age of twenty-one years *and* without issue. In neither of those two cases did the contingency as to dying under twenty-one happen, and therefore the same principle which induces me to say that there was no gift over after the death of Robert Watson, when he attained the age of twenty-one, induces me also to say that there is no declaration in the will that the ultimate trusts of Stainton shall be applicable to Hemlington.

For these reasons, it is my duty to move your Lordships that the judgment below be affirmed.

LORD ST. LEONARDS. — My Lords, in this case I have the misfortune to differ from my noble and learned friend who has just spoken, and from my noble and learned friend on the opposite side of the House; and as I thought it necessary, in order to be precise, to write (though I am little in the habit of so doing), after the argument, what my opinion was in this case, I shall now take the liberty of reading what I wrote. Both my noble and learned friends have had, I will not say the advantage, but the opportunity, of reading what I wrote, and which I am now about to read to your Lordships.

The legal fee simple in this case is given to the trustees upon the trusts afterwards declared of the same. Upon the whole of the will I have arrived at the conclusion that the testator intended to dispose of the equitable fee simple, and not to die intestate * 89 as to any portion of it. There is * no residuary devise, unless the declarations of trust, to which I shall presently refer, operate in effect as such. Looking at the provisions in the will, I am satisfied that the testator never intended, in an event not unlikely to happen soon after his own death, viz. the death of his grandson, Robert, after attaining twenty-one, but without issue, to allow his estate to descend to his son in fee. If the will is open to that construction, it must be that the expressions which he has used fail to give effect to his intention.

The first trust is (subject to the directions to raise annuities and a contingent legacy) for his grandson, Robert Watson, and the

heirs of his body ; an equitable estate tail by apt words of limitation ; but in case he shall die under twenty-one, and without issue, then a part of the estate is to be in trust for his granddaughter, Ann Watson (Robert's sister), and the heirs of her body ; and in case she should die under twenty-one, and without issue, over. And the testator directs the trustees, out of the rents, to raise during the infancy of his grandchildren respectively, such maintenance money for them as the trustees should think fit.

Now to stop here. Robert died without issue, but attained twenty-one ; so that he did not die under twenty-one, *and* without issue. Did then the devise over to Ann take effect ? The devise of the equitable estate was clearly to Robert in tail ; and no construction can be put upon the devise which would narrow or restrict his estate tail. No one can take under the will until that estate tail is exhausted by Robert's failure of issue, whenever that might happen, without reference to the period of his death. So that the construction of the gifts over is wholly immaterial to Robert and his issue ; it is only material as between the granddaughter Ann and the heir at law of the testator, Ann's father. If the first devise had been to Robert in fee, it is clear not only that the word "and" could not be read "or," but that if the disjunctive conjunction had been used *by the testator, * 90 the conjunctive one would have been introduced in its stead ; because the testator could not be understood to mean to give the estate over from his first devisee's children, in the event of his dying under twenty-one, leaving children ; and yet they could not be entitled if the estate went over in consequence of his dying under twenty-one, without regard to his leaving issue behind him. In such cases, therefore, the Court does more than reject a word, for it substitutes one word for another, and, indeed, one that is directly opposed in its import to the one which is rejected. It is owing to the infirmity of our language that we have no word to express in a combined sense the two conjunctions "or" and "and." In devises, where the first taker, although confined by the testator, in words, to a life estate, has been held to take an estate tail, under a subsequent gift to "the heirs of his body," the Courts have disregarded words annexed to the words, "heirs of the body," such as that they were to take "as tenants in common," in favour of the general intention. Upon the whole will the paramount interest is regarded, and directions contrary to that view

are, in effect, struck out of the will. So when the testator's intention is clear, but he fails in words to provide for the precise event which happens, the Courts supply the words. For example: a gift to a woman during her life, if she shall so long continue his widow, and, in case she marry, to A. in fee, he will take upon either the death or marriage of the widow.

In the case of *Newburgh v. Newburgh*,¹ in introducing gifts over in a will by an enumeration of the estates, the estate in one county was, by mistake, struck out by the conveyancer, in settling the draft; and an attempt was made, but failed, to be allowed to prove the mistake by parol evidence, and to have it corrected.

When the case reached this House it was ultimately decided that the * clause in which the county was omitted might be rejected, or the missing county be considered as inserted in it, so as to give all the estates over to the countess for life, upon the evidence furnished by the context of the will of the intention of the testator.²

Where the expression is in a gift over in case of a death "without being married," it has, in favour of the intention, been construed "without ever having been married." *Bell v. Phyn*.³

I will not multiply the instances in which words have been rejected, or altered, or supplied in a will, in order to give effect to the clear intention. But, as a general rule, words should be received in their natural grammatical import, and effect given, if possible, to every word in the will.

Now in this case the primary intention of the testator was to give an estate tail to Robert; and I hold that we are not at liberty to cut down or affect that gift in any way. And this at once removes the difficulty where the first devise is to take place. The gift over is in case he die under twenty-one, *and* without issue. It is argued that you cannot simply read "or" for "and"; for if you did, and Robert died under twenty-one, leaving issue, such issue could not take, and that would defeat the declared intent of the testator. It is argued that you must provide for the naked case of his dying under twenty-one, for you cannot reject those words as surplusage, or add to them. You may not, it is urged, read them as a gift over, if he die under twenty-one, without issue.

Now, in my opinion, the testator intended what he has clearly

¹ Sugden's Law of Property, 367.

² 7 Ves. 458.

³ See *Langston v. Langston*, 2 Clark & F. 194, 239 et seq.

expressed, that his grandson should take an estate tail ; and I think that he meant, what is not clearly expressed, that the estate should go over if his grandson *died at any time without * 92 issue. The reason why the age of twenty-one was introduced was, I think, because he did not intend the grandson to take the estate itself, that is, to enter into the enjoyment of it until he attained twenty-one ; for the legal estate was in the trustees, and they are to supply maintenance for the son, whilst under twenty-one, out of the rents. He intended therefore to give the estate over in case his grandson never, in his view, became entitled to it, viz. if he died under twenty-one, but still not unless there was a failure of issue. And he also intended it to go over if his grandson did attain twenty-one, and enter upon the enjoyment of the estate, but should afterwards die without issue. And I think that we are enabled by the rules of law to give effect to that intention.

The first case cited at the bar, *Soulle v. Gerrard*,¹ was decided when executory devises were not allowed ; a fee could not be mounted on a fee ; but still the case is instructive as to the way in which we are at liberty to deal with that which is now before us. The devise was to the testator's son, Richard, in fee, "and if he died within the age of twenty-one or without issue," then the land should be equally divided among the testator's other sons. Richard died within age, leaving issue. Anderson, Chief Justice, said that "if the limitation had been single, viz. 'if he died without issue,' &c. it was an estate tail, and explained the former limitation. And he conceived that this part of the limitation, 'if he die within age,' was utterly void ; for a remainder could not depend upon a fee, and then it is all one as if the limitation had been single, 'if he die without issue,' so Richard had an estate tail." Walmsley, Justice, agreed, and added that "if the remainder might pass upon his dying within age, yet it could not be until he died without issue also ; for the words being 'if he died within *age, or died without issue, then,' &c. ; this, then, * 93 which shows the beginning of the remainder shall be when he dies without issue, and not before ; so it is all one as if the disjunctive 'or' had been a copulative." Beamond and Owen, Justices, agreed, and the latter added that, "if the remainder might commence upon the first limitation, yet it ought not to commence,

¹ Cro. Eliz. 525 ; S. C. nom. *Sowell v. Garret*, Moore, 422.

by the words and intent, until the other part be performed also, viz. that the devisee died without issue."

This is an important authority, for although it would be decided differently now, because executory devises within due limits are valid, yet it shows that where the first devise is expressly or by implication a devise in tail, a gift over in case the devisee die under twenty-one, or without issue, may be read without alteration, and yet a death under twenty-one will not carry the estate over, unless also there is a failure of issue, and if necessary to this construction, the words "if he die under twenty-one" may be rejected, and still further, that "or" may be read "and," and yet the estate will go over if the first devisee die under age, leaving issue.

*Woodward v. Glasbrook*¹ is also an authority bearing on this case. The devise was to the testator's children, as tenants in common in tail, and if any of them should die before twenty-one or unmarried, his part should go over to the survivors. Chief Justice Holt held that one dying unmarried, though he attained twenty-one, his share went over. If the death had been under twenty-one, but the devisee had married, the estate, I apprehend, would not have gone over, so as to defeat any issue of the devisee, tenant in tail; so that Holt appears to have held that the words "shall die before twenty-one" were immaterial, and

* 94 * the estate would go over whenever the devisee died unmarried.

This brings me to the case of *Brownsword v. Edwards*,² which was so much discussed at the bar, and I must without reserve say that I consider it a binding authority, and I entirely subscribe to Lord Hardwicke's doctrine in it. I cannot upon any sound ground distinguish it from the case now before the House. The estate was devised to trustees and their heirs, to receive the rents until John Brownsword should attain twenty-one, in trust, to place them out to improve the estate; and if he should live to attain twenty-one, or have issue, then to him and the heirs of his body; but if he should happen to die before twenty-one, and without issue, then a like gift to a female child, &c. and over just in the same way. The children were considered to be the testator's legitimate offspring; John attained twenty-one and died without issue. It was said that this case differs from the one under appeal, inasmuch as the former was a gift upon a contingency, whilst in

¹ 2 Vern. 388.

² 2 Vez. Sen. 243 - 247.

the present an estate tail is at once given ; but if that difference has any weight, I think that it is in favour of the appellants. Lord Hardwicke relied upon the gift being in tail, and upon the plain intention of the testator to give it over and not to let in the testator's right heirs ; he held that John took an estate tail when he attained twenty-one, and that he would have done so had he had issue, though he had died before twenty-one ; the construction was to give him an estate tail in either event. As to the subsequent words in the construction of wills, he said, " the Court has construed the words conformably to the intent of the testator, as much as possible, ranging in a different order and transposing them to comply therewith " ; but in that case there was no such necessity * (this was what Lord Hardwicke said), for there * 95 was " a plain natural construction upon these words, viz. if John shall happen to die before twenty-one, and also shall happen to die without issue, which construction plainly makes the dying without issue to go through the whole, and fully answers the intent which was in that manner " ; Lord Hardwicke added that " an estate tail is capable of a remainder, and it is natural to expect a remainder after it."

It appears, therefore, that in a case I think more difficult to manage than this, Lord Hardwicke after " an estate tail " read the words " if John should happen to die before the age of twenty-one years, and without issue " ; thus, " If John should happen to die before twenty-one, and [also should happen to die] without issue." This effected the intention of the testator by plainly construing the words " dying without issue " to go through the whole sentence.

This construction I am prepared to adopt, and to apply it to this case ; Lord Hardwicke did not convert " and " into " or," although that may be done in favour of the intention just as " or " may be read " and " when the intention requires it: *Bell v. Phyn*.¹ It is said that the construction in *Brownsword v. Edwards* gave no effect to the words " die under twenty-one," but full effect was given to them by reading them as connected with the subsequent words, " without issue " ; and it is no objection that by this construction the words give no additional force to the devise, for the construction does, taking the words altogether and giving full effect to them all, effectuate the clear intention of the testator.

¹ 7 Ves. 458.

The later case of *Doe v. Jessep*¹ may be considered as similar to the one before this House, and the Court of King's Bench, * 96 not in words overruling the well-considered * case of *Brownsword v. Edwards*, decided, in direct opposition to the principle upon which it was determined, that "and" was to receive its natural construction, and, therefore, that although the first devise was to an infant in tail, yet the gift over, if he should happen to die under twenty-one *and* without issue, required both events to happen, and the devise over was held to fail as the first devisee attained twenty-one, although he died without issue. My noble and learned friend, the Lord Chancellor, considered that he had to elect between Lord Hardwicke's decision and the late decision of the Court of King's Bench, and he felt himself bound by the latter. The cases were well calculated to embarrass the Court, but now that the case has been more fully considered, I think that your Lordships will be inclined to support the earlier authority. Mr. Fearne, who refers carefully to *Brownsword v. Edwards*, treats it as a clear authority.² The case of *Doe v. Jessep* was hastily decided and not well considered. Independently of what must occur to every one who reads it, and which has been pointed out by my noble and learned friend, that the distinction there drawn by Lord Ellenborough is one that cannot be maintained for a moment, I say independently of that the Judges of that Court actually decided this important point of law without hearing both sides, and their reasons show that they did not accurately distinguish between cases where the first devise is in fee, and the case before them, where the devise was in tail. This is proved by what fell from two of the learned Judges during the argument. In delivering judgment the Chief Justice thought that no inconvenience would ensue by construing the word "and" in its natural sense, so that he considered it unimportant that the gifts over were all destroyed by this * 97 construction. * Le Blanc, Justice, said that the case "was so far distinguishable from *Brownsword v. Edwards*, that there the word 'and' was construed 'or'" (which we have seen was not the case), "to prevent the working of an injury to the issue; here 'and' is required to be construed 'or' in order to work the very injury, to avoid which in other cases the Courts have construed 'or' to be 'and.'" Then reading it in the natural sense of the word, the son having attained twenty-one, the limitation over, which was

¹ 12 East, 288.² Cont. Rem. 506; Exec. Dev. 142.

only to take effect if he died before twenty-one *and* without issue, was defeated." Bayley, Justice, added: "If the son had died under twenty-one, leaving issue, the construction contended for by the plaintiff's counsel would have left the testator intestate as to such issue, which was clearly against his intention." These observations prove that the real nature of the case was misunderstood; for, as the first devisee took an estate tail and not an estate in fee, the construction adopted by Lord Hardwicke would not have defeated the issue in any case which could happen; I submit, therefore, to your Lordships that the case of *Doe v. Jessep* cannot be relied upon as an authority.

It so happened when the case now before the House was heard upon appeal in the Court below, that the authority of *Brownsword v. Edwards* had recently come before the Court of Exchequer, in the case of *Mortimer v. Hartley*,¹ and, in an elaborate written judgment delivered by my noble and learned friend opposite, *Brownsword v. Edwards* was recognised as a clear binding authority; and *Doe v. Jessep*, which had been relied upon in the argument, was manifestly passed over as of no weight. It unfortunately happened that this case was not referred to before my noble and learned friend the Lord Chancellor, and he had not therefore the benefit of the opinion of the Court of Exchequer.

* In the case in the Exchequer, after successive estates tail * 98 to a son and daughter, the testator declared that if both of them should die under twenty-five, *or* without leaving lawful issue, he gave the estate to his brother in fee. The second devisee in tail died an infant, and without having been married. The first devisee in tail attained twenty-five, and died without issue. The Court of Exchequer relied upon the first gift being in tail, and, acknowledging *Brownsword v. Edwards* as a binding authority, followed it strictly, and read the words as they were found, because, by that construction, in the event which happened the estate would go over to the brother according to the testator's intention. But they observed, that, if in the case before them any change in the language should be made, the one which would be most likely to effectuate the intent of the testator, would be to read the words as if they had been, "and if John and Ann should die under age or at any time without issue." By so reading them the issue

¹ 6 Exch. 47.

would take if their parents died under twenty-five, and the brother would succeed on the determination of the estate tail. But if this could not be done, they thought they ought to make no change at all. They did not, therefore, as the event did not require it, construe the words as embracing every event without varying them ; but they clearly intimated that they would have fully followed out the decision of Lord Hardwicke, if the circumstances had required it. I need not say that I now entertain great doubt what that decision might have been, because my noble and learned friend opposite now thinks that this case below was rightly decided. He of course could not have been aware of the construction which I have now put upon the judgment which was delivered by him in the Court of Exchequer.

My Lords, as I understand, the ground upon which the appeal is now to be dismissed, is one that really goes back
 * 99 * to *Fairfield v. Morgan*.¹ My noble and learned friend, as I understood him, of course not overruling it, because it is impossible to do so (it is the established law of this country, and we have not the power to overrule it), but giving an opinion that if that case were now to be decided, he should be inclined to come to a different decision, and relying simply upon the words of the devise, not to give effect to the gift over in a case very likely to happen, and which nobody denies that the testator intended to provide for. That would bring us back to a rule of law which I believe, as I understand the law at present, does not exist. Nobody is more disposed than I am to abide by clear words, and to give to them their natural and grammatical meaning ; but I never did, and I never can come to this conclusion, that the words of a will cannot admit of modification according to the real intention of the testator, as you find it from other expressions, or from the whole context of the will. It is difficult to lay down any abstract rule upon the subject, but where I find the intention and I find words pointing out the intention, and that if I give to the words their simple meaning according to grammar and according to their plain *primâ facie* import, I defeat the intention, I hold that I am bound by every rule, both of law and equity, to see whether I cannot give to them, by natural construction, an import which will effectuate and not defeat the intention.

Now take the case of *Fairfield v. Morgan*. There one word

¹ 2 New Rep. 38.

was substituted for another, and the word substituted is directly opposite in meaning to the one for which it is substituted. That is the law of this country, decided in this House, and which has been followed ever since, and no one doubts it. There, so far from giving the words their natural meaning, this House felt itself at liberty to *change the words. The testator *100 had expressed what he meant in case two events should happen, using the disjunctive conjunction "or," instead of the copulative "and." You said he could not mean that. He had given an estate in fee, and that estate would go over if the party died under twenty-one, unless you altered the word. Then you took the liberty of altering the word by introducing another word, in order to do that which this House, as a judicial tribunal, and every other judicial tribunal is bound to do, namely, in order to effectuate the intention of the testator.

It appears to me, therefore, I confess, that the decision in this case will go very far, I will not say to overrule *Fairfield v. Morgan*, because it cannot be overruled, but to shake the principle of it. It will lead to simply looking at the words superficially, in order to ask, "What do the words mean? we will abide by the words and take them as we find them." Now that would, no doubt, avoid a great many difficulties; but I confess I do not think that that is a rule by which we, as a judicial tribunal, should be guided. I can only say, therefore, with great respect for my noble and learned friend, that I entertain as clear an opinion as I ever did in any case, that according to the true construction of the rule of law as applied to this case, the gift over is a perfectly good one, and that it falls directly within the authority of *Brownswold v. Edwards*. And I never can press too much upon your Lordships' attention that the whole depends upon the first gift being in tail, not being in fee, and that, therefore, we are at liberty, without affecting in any manner the estate given to the first devisee in tail, to read the words introducing the gift over without violence at all. By a natural, and, I think, an easy construction, adopting the rule laid down by Lord Hardwicke, we are at liberty to give effect to the gift over. That case, upon that very elaborate judgment, was for many years considered an authority. Mr. Fearne treats it as such, and *speaks of it without intimating the *101 slightest doubt or hesitation as to its being law. And then, with regard to the case of *Doe v. Jessop*. We cannot read without

respect the names of the very learned persons by whom that case was decided ; but, seeing the way in which it was decided, and the evidently mistaken reasons that were given for the decision, I cannot think that that is an authority which can overrule the well-considered case of *Brownsword v. Edwards*. And although it is true, as my noble and learned friend has remarked, that *Doe v. Jessop* has been decided a good many years, I must observe that *Brownsword v. Edwards* was decided a good many years before that, and I have no hesitation in saying that it is entitled to much greater weight as an authority.

Then, my Lords, considering, as I must consider, the matter in the way I have submitted it to your Lordships, and which I have done in justification of the opinion I entertain, and in order, so far as any statements of that opinion can go, that the law may be kept, as far as may be, within the course in which it has usually flowed, I come to the second question, and upon that I have an equally clear opinion, unfortunately, differing also from that of my noble and learned friend. I did not understand, in listening to my noble and learned friend's explanation, and I do not at this moment understand, where is the distinction between Hemlington and Stainton. I will read to your Lordships what I wrote upon this point.

But if I am wrong as to the operation of the devises, the question then arises whether the two estates, by force of the ultimate trust, do not go over to the Darnells. The Vice-Chancellor decided that they did, and did not give any opinion on the point of law which I have already considered. I have seen a shorthand writer's note of the judgment of the Vice-Chancellor, which appears to me to be an imperfect and incorrect report of what must have fallen

* 102 from * that learned Judge. My noble and learned friend held that the Stainton estate did pass to the Darnells under the ultimate trust, but that the Hemlington estate (which also is in the parish of Stainton) did not, but descended to the heir at law. He expressed considerable doubt upon each point, but felt himself bound to defeat what, as it appears to me, was the testator's intention.

In considering this point, we assume that the limitations over were contingent, and that the contingency did not happen. Now in that view the case stands thus ; and perhaps we shall more readily apprehend the point if we put the trusts of the two estates in juxtaposition. First, the two estates are given to Robert and

the heirs of his body, "but in case he shall die under the age of twenty-one, *and* without issue,"

The Hemlington estate is to be in trust for Ann Watson, and the heirs of her body ;

But in case she shall die under twenty-one, *and* without issue, upon such and the same trusts as are hereinafter declared of my farm at Stainton aforesaid, viz. :

To Richard for life, &c. Remainder to his wife during widowhood, "and, subject to the trusts hereinbefore thereof declared, the same shall be"

In trust for the three grandchildren (the Darnells) as tenants in common, their respective heirs and assigns for ever.

So that, in the events provided for, the two estates originally * given to Robert would be reunited and go to the * 103 Darnells.

It admits of no doubt that the ultimate trust of the Stainton estate must be added to the previous declared trusts of the Hemlington estate. It seems difficult to maintain that the same trust of both estates will not, if the events happened, carry over both of them. The Stainton estate was held to go over on solid grounds. The ultimate trust, being "subject to the trusts hereinbefore declared," carried every interest which the testator had not before parted with. The devisees, of course, took subject to the contingencies and estates, whatever they were, before declared or given ; but they did not take upon the contingencies, or, in other words, their remainder in fee did not depend upon the contingency taking effect. If, as the event happened, it failed, but the prior estate, as the event also happened, also failed, they would take. The ultimate devise was, in effect, a devise of all the testator's remaining interest in the estate, so as wholly to exclude the heir at law.

Now we have seen that the devise of the Stainton estate was "in case Robert should die under twenty-one, and without issue." That was a contingency which we assume never happened ; yet

that contingency was held not to override the ultimate devise to the Darnells. Therefore, the circumstance that the gift over was the last in the series which followed the expression of the contingency upon which the estate was given over, did not operate to confine this ultimate gift like the gifts which precede it, to the happening of the contingency.

What, then, is the distinction between the ultimate gift of Hemlington and the ultimate gift of Stainton? The gifts over, in the first instance, were both upon a contingency, and upon the
* 104 same contingency, viz. Robert's death *under twenty-one, and without issue; and that contingency, although it was held to have failed, did not prevent effect being given to the ultimate gift to the Darnells. Now the only distinction as to Hemlington is, that after an estate tail in Ann, the like condition is repeated, viz. in case she shall die under twenty-one, and without issue, and that, I assume, failed like the former one to take effect. But this contingency was held, upon appeal, to govern the trust for the Darnells, and to make it dependent upon that contingency, which not having happened, the trust failed, and the estate went to the heir at law, but the like contingency as to both estates was held not to affect the ultimate trust at Stainton. If, therefore, both estates had been given to the son and his wife, and then to the Darnells, they would have taken both, as they have taken one of them, notwithstanding the contingency had not happened. This, I think, was rightly decided.

The simple question then is, whether the introduction into the trusts of Hemlington of another limitation, with a contingent gift over in all respects similar to the one, and with the like contingency, which preceded the gift of Stainton, can vary the construction? Now, can it matter whether there be one contingent gift over, or two such gifts? In either case the gifts follow a contingency; but that does not affect the ultimate trust, because it is not dependent upon any contingency, but is only subject to the trusts before declared. The construction would be the same if twenty different contingencies had before been provided for. I should hold this opinion if the gift of Hemlington stood alone; but I consider the decision as to the Stainton estate, of which I approve, as an authority for the like construction as to the Hemlington estate. I could not hold that the ultimate trust of the latter estate took effect, notwithstanding that Robert attained

twenty-one, * and yet was prevented from having that *105 operation, because Ann attained twenty-one. To sustain that view we must, I think, overrule the decision in both of the Courts below as to the Stainton estate; and that I am not prepared to do.

Now I am bound to add, though I have great respect for what has fallen from my noble and learned friend, I cannot see the distinction he draws between the two estates. I understood him to say that there were two contingencies; but I have not heard any distinction as to the general effect of a gift over being open to a different construction according to whether there be one contingency or two contingencies. One contingency has been held not to affect the gift over, "subject to the trusts before declared." You take every thing that is not disposed of. Two contingencies have been held to prevent the estate from going over, yet it is given in exactly the same words, "subject to the trusts before declared." Therefore, although I have no doubt I am wrong, because both my noble and learned friends think so, for they have seen what I have written, and of course it has failed to make any impression upon them; yet I must say, that, having carefully considered this case, I am utterly unable to see where my reasoning is wrong. Of course the decision of your Lordships will be against the appeal, and will affirm the decree below.

LORD WENSLEYDALE. — My Lords, I have paid the closest attention to this case, and to the arguments at your Lordships' bar, and also to the opinion of my noble and learned friend opposite, the notes of which he had the kindness to communicate to me a few days ago. I have fully considered the reasoning on both sides, and have determined that I ought to concur in recommending your Lordships to affirm the order of my * noble and *106 learned friend on the Woolsack, though with the hesitation that any one must naturally feel when such authorities disagree. I think that my noble and learned friend on the Woolsack was right in the construction which he put upon the clause in the will on which the case depends. I have been long and deeply impressed with the wisdom of the rule, now, I believe, universally adopted, at least in the Courts of Law in Westminster Hall, that in construing wills and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be

adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further.¹ This is laid down by Mr. Justice Barton, in a very excellent opinion, which is to be found in the case of *Warturton v. Lovellma*.²

The expression that the rule of construction is to be the intention of the testator is apt to lead into error, because that word is capable of being understood in two senses, viz. as descriptive of that which the testator intended to do, and of that which is the meaning of the words he has used. The will must be in writing, and the only question is, what is the meaning of the words used in that writing. To ascertain which every part of it must be considered with the help of those surrounding circumstances, which are admissible in evidence to explain the words, and put the Court as nearly as possible in the situation of the writer of the instrument, according to the principle laid down in the excellent work of Sir James Wigram on that subject.

Adopting that rule, I think that the words of the clause * 107 * in question ought to be read in their ordinary sense, viz.

that the trust estate was to go over, in the double event of Robert Watson dying before twenty-one, and without issue, which event not having happened the limitation over would not take effect. It cannot certainly be said that such construction would lead to any absurdity whatever, nor to any absolute inconsistency with the context. Who shall say that the testator might not have thought, that if Robert attained twenty-one he would be able to cut off the entail, and provide for his family, and so no ulterior limitation would be necessary? If the words were quite clear we could not alter them, in order to carry into effect what might reasonably be conjectured (but it would have been conjecture only) to have been the design of the testator. If, for instance, the words had been "or should die under twenty-one without issue," instead of the word "and," they could not have been understood in any other sense, and the limitation over would, in the event which has happened, have been defeated.

The whole difficulty in this case arises from the expression,

¹ See *Edgeworth v. Edgeworth*, Law Rep. 4 H. L. 37.

² See *Ante*, p. 76, n. (h).

"but in case he shall die under the age of twenty-one years *and* without issue," which expressions are capable of being read as similar expressions were by Lord Hardwicke in the case of *Brownsword v. Edwards*.¹ And the simple question is, whether, in this case, we are bound to read the words in the same way as was done in that case.

Now I must say that having heard the observations of my noble and learned friend opposite, so fully, distinctly, and clearly stated, I have had great doubt as to the propriety of the opinion I have formed; and with the high respect I feel for his opinion, I have hesitated in coming to * a conclusion at variance with * 108 it. But the principle of construction which I have laid down is in my mind of such paramount consequence, that I think it much more important to adhere to it than to follow the authority of the previous decision of Courts upon words in other wills resembling those used in the present. We are bound by decided cases, for the sake of securing as much certainty in the administration of the law as the subject is capable of. But when the decision is not upon some rule or principle of law, but upon the meaning of words in instruments which differ so much from each other, and when the proper construction is so varied by the peculiar circumstances of each case, it seldom happens that the words of one will are a sure guide for the construction of words resembling them in another. Besides, the salutary rule of construction I have mentioned may have been misapplied in the particular cases, and then they really become of no binding authority at all.

When, indeed, by any course of decisions, words have acquired a particular signification, it may be presumed that the framer of the instrument uses them in the sense so acquired, and it is fitting so to construe them. But when there has been an instance or two only of the words being read in a different sense from that which they naturally bear, we cannot make any such presumption. Now there is only one case of such a construction of these words, that of *Brownsword v. Edwards*,¹ which bears upon this question. There the testator gave his estates to trustees and their heirs in trust to receive the rents and profits, and place them out at interest for the improvement of the estate till his son John should attain twenty-one, and if he should live to attain twenty-

¹ 2 Vez. Sen. 247.

*109 one, *or* have issue, then to John * and the heirs of his body; *but* if John should happen to die before the age of twenty-one, *and* without issue, then in trust till his daughter should attain twenty-one; and if she should happen to die (using exactly the same words), then over. Consequently as soon as John attained twenty-one, or had issue, though he died before twenty-one, a fee tail vested in the son. He did attain twenty-one, and had that fee tail, as he would have had if he had had issue. And Lord Hardwicke held that the subsequent words could, by a natural construction, be read as importing that if John should happen to die before twenty-one, and also should happen to die without issue, and so providing for the determination of the estate tail, the estate should go by way of remainder to the daughter.

The observation sometimes made on this case, that Lord Hardwicke read “or” for “and” is not correct, and this is pointed out and explained in the case of *Mortimer v. Hartley*.¹ If he had done so, he would have deprived the son’s issue of the estate in case the son had died before twenty-one with issue, which would have been a strong objection to that construction; for, in construing wills, the events which might possibly have happened as well as those which did happen are to be considered. The decision, however, is not open to this objection, for this, as has been already stated, is obviated by putting the somewhat forced construction on the words which Lord Hardwicke adopted.

Upon fully considering that case, I think it may be well doubted whether the true construction of the words was not after all the natural and ordinary one, viz. that if the son should attain twenty-one, or have issue, then he should have an estate tail; but that on the other hand if he died under twenty-one and had no

*110 issue, the estate * should go to the daughter. This is the simple and natural meaning of the words. There was nothing in the least unreasonable in it, and it was unnecessary to recur to the very unusual construction adopted by Lord Hardwicke. But be this as it may, this case has not been followed by any uniform course of other decisions, so as to make it, upon the principle above explained, binding upon us in the construction of similar words in this will. On the contrary, it is directly impugned by that of *Doe d. Usher v. Jessop*,² where the natural and ordinary

¹ 6 Exch. 47-60.

² 12 East, 288.

sense of the same words was adopted. In that case Lord Ellenborough expressed himself in very strong terms in favour of the rule of construction above stated. The criticisms which have been made on that case, that both sides were not heard ; that it was not argued at full length, and that the short observations of Mr. Justice Le Blanc and Mr. Justice Bayley were not correct, do not appear to me to detract from its authority. The opinions did not affect the principle of the decision, nor did it require a long argument to enforce and apply the sound rule of construction so forcibly expressed by Lord Ellenborough. I think that there is no rule more useful and important in the construction of written instruments than this ; and that it is by much the wisest course to abide by it.

The result is, that the double event not having happened of Robert Watson having died under twenty-one *and* without issue, none of the remainders expectant upon his estate has taken effect, and the ultimate remainder is undisposed of by the first part of his will. Upon the second part of the case, I concur with my noble and learned friend on the Woolsack, in the opinion he has expressed as to the Hemlington estate being undevise^d by the last clause. I am * rather inclined to think he might * 111 have gone further, and said that not only the Hemlington estate, but also the Stainton estate, was undevise^d, but as part of the decree relating to Stainton is not appealed against, that becomes immaterial.

I therefore concur in the opinion of my noble and learned friend on the Woolsack, that this appeal ought to be dismissed.

THE LORD CHANCELLOR. — With respect to the costs we make no order, but simply dismiss the appeal.

Order affirmed, and appeal dismissed.

1857. May 28.

ALEXANDER HONEYMAN, *Appellant*.JOSEPH MARRYATT, *Respondent*.

A letter accepting an offer to purchase an estate on the terms stated in an advertisement, added a sum for deposit and a day for completing the purchase: no reply was given to this letter:—

Held that there was no complete contract on which to sustain a bill for specific performance.

AN estate was advertised by the respondent for sale. The appellant proposed to purchase it, and authorised his solicitor to make an offer of a certain sum of money for it. The respondent's estate agent on the 4th of April wrote to the appellant's solicitor: "Mr. Marryatt has authorised us to accept the offer, subject to the terms of a contract being arranged between his solicitor and yourself. Mr. Marryatt requires a deposit of from 1200*l.* to 1500*l.*, and the purchase to be completed at Midsummer Day next." The parties afterwards got into a long correspondence, and the respondent insisted on 1500*l.* as the deposit, and on the 27th of April as the day for completing the purchase. These terms were not complied with, and he treated the contract as at an end. The appellant filed his bill, alleging the offer and the letter of the 4th of April in answer thereto as constituting a valid contract. The respondent put in a general demurrer, and the Master of the Rolls held that the words "subject to the terms of a contract being arranged between his solicitor and yourself" prevented the letter of the 4th of April from constituting an absolute contract, and that the respondent had a right afterwards to add the terms as to the deposit, and the day for completing of the contract; his Honour therefore gave judgment in favour of the demurrer and dismissed the bill.¹ An appeal was brought against the order for dismissal.

When the appeal was called on, no counsel appeared for the appellant.

¹ 21 Beav. 14.

Mr. F. O. Haynes appeared for the respondent.

* THE LORD CHANCELLOR. — If no one appears for the *113
appellant, we must dismiss the appeal, with costs.

LORD WENSLEYDALE. — There certainly was no complete contract in this case.

SHREWSBURY AND BIRMINGHAM RAILWAY COMPANY v. THE
NORTHWESTERN RAILWAY COMPANY.

1857. March 12, 13, 16, 17, 19; May 13.

The DIRECTORS, &c. of the SHREWSBURY AND BIR-	} <i>Appellants.</i>
MINGHAM RAILWAY COMPANY,	
The DIRECTORS, &c. of the NORTHWESTERN RAIL-	} <i>Respondents.</i> ¹
WAY COMPANY and of the SHROPSHIRE UNION RAILWAYS AND CANAL COMPANY,	

Company's Acts. Directors' Powers. Contracts. Specific Performance.

Prima facie all corporate bodies are bound by contracts under their common seal; but this *prima facie* power to contract cannot be insisted on as to matters where, from the nature of the corporate body or the object of its incorporation, it is expressly or impliedly, "by reasonable inference," prohibited from contracting. A contract as to such matters is *ultra vires*.

Where a contract between two companies proves to be one by which one of the contracting parties will gain considerable advantages, at the expense of the other, while the other will receive no corresponding benefit, whether such contract is or not legally valid, equity will not aid in enforcing it by a decree for specific performance.

A private Act of Parliament authorised one railway company to accept a lease of another railway: the directors of the first company then entered into an agreement with the directors of a third company, the stipulations of which were to be performed "during the continuance" of such lease. No lease within the provisions of the Act was ever granted. The agreement appeared to be, if legally valid, at least unfair to the shareholders of one of the companies.

Held, that equity would not enforce it by a decree for specific performance.

Lord St. Leonards and Lord Wensleydale, being shareholders in one of the companies, declined to take part in the hearing of the case.

¹ *Simpson v. Westminster Palace Hotel Co.*, 8 H. L. Cas. 715.

IN this case there had been a suit to enforce an agreement entered into between the appellants and the respondents. The circumstances out of which that suit arose were these:—

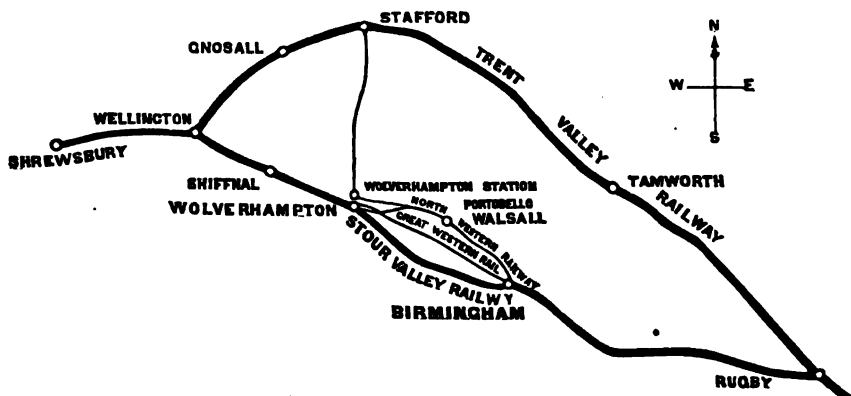
*114 *The Shrewsbury and Birmingham Railway is the property of the appellants, and runs in a southerly direction from Shrewsbury through Wellington and Shiffnal to Wolverhampton.

The Shropshire Union line runs in a similar direction from Shrewsbury through Wellington (this part of the line being common to both companies), and thence by Gnosall to Stafford.¹

The Northwestern Railway runs from London through Rugby to Birmingham, and then through Walsall to Portobello, skirts the town of Wolverhampton, outside which there is a station, and thence on to Stafford. Here it joins the Shropshire Union line, and curves round through Gnosall to Wellington, and then proceeds by the same line as that of the appellants to Shrewsbury. The respondents also hold on lease a railway, called the Trent Valley line, which runs from Rugby through Tamworth to Stafford, and thence on as before to Shrewsbury. They have also another railway called the Stour Valley line, which runs direct from Birmingham to Wolverhampton, where it joins the appellants' railway.

*115 *In 1847, the main line of the Northwestern was completed; the Trent Valley line was in the course of formation, and the Northwestern Company received the power (which it has since exercised) of taking that line on lease.

¹ The accompanying sketch is necessary for the clear understanding of the case.



The Shropshire Union line was then in the course of being formed; and by the Acts obtained by that company, as well as by those obtained by the appellants, provisions were made for the management of that part of the line which was common to the two companies, by a joint committee of directors formed from the members of both.

In 1847, the Northwestern Company applied to Parliament for leave to take on lease the Shropshire Union line. It was believed that if that application should be granted, the Northwestern Company would be in a position to command the traffic between Birmingham, Wolverhampton, and Shrewsbury, as well as between Rugby, Birmingham, Stafford, and Shrewsbury. The appellants therefore opposed the application, and that opposition led to the agreement which was the subject of this suit.

On the 13th May, 1847, certain articles were executed between the appellants of the one part, and the respondents of the other part, by which it was arranged: "1. That all traffic between Wellington or Shrewsbury or intermediate stations, and Rugby, or any point to the south of Rugby, shall be kept separate, and divided between the two companies in proportion to the mileage travelled over each of the lines of the Shrewsbury and Birmingham and the Shropshire Union Companies, such joint account and division, however, to be optional with the Shrewsbury and Birmingham Company. This arrangement to include all the London traffic by whatever route it may pass. 2. Neither the Shropshire Union nor the Northwestern shall, during the continuance of such joint account and traffic, convey from Wellington, or any part of their line westward of Wellington, goods or passengers to any part of the Shrewsbury * and Birmingham line east of *116 the same place, or be entitled to participate in such traffic."

An agreement was to be forthwith prepared to carry these articles into execution. In consequence of these articles, the opposition to the bill was withdrawn, and the Act 10 & 11 Vict. c. 121, passed. It was entitled "An Act to authorise a lease of the undertaking of the Shropshire Union Railways and Canal Company to the London and Northwestern Railway Company."¹

¹ The Act recited the three Acts by which the Shropshire Union Company had been authorised to make the railways therein mentioned, and enacted (§ 1), that "on the completion of the works of the railways by the recited Acts authorized to be made, so as to be opened for public traffic, or at such earlier period as

* 117 * After the passing of this Leasing Act, an agreement dated 12th October, 1847, for more effectually carrying it into operation was made. This agreement was entered into between the Shrewsbury and Birmingham Company, of the one part, and the London and Northwestern and the Shropshire Union Companies, of the other part, and was sealed with the seal of each

may be agreed on between the said companies, the Shropshire Union Railways and Canal Company shall, and they are hereby empowered and required to grant, and the London and Northwestern Railway Company shall and they are hereby empowered and required to accept, a lease in perpetuity of the undertaking of the said Shropshire Union Railways and Canal Company at a rent," and on terms therein mentioned.

By § 2, a joint committee of directors was to be appointed, consisting of eight directors of each company.

By the 8th section, the joint committee was to exercise all the powers on behalf of the Shropshire Union Railways and Canal Company, as to contracts and the management of the works and property, "and also the management of the said railways, when and as the same shall be completed, which if this Act had not been passed might have been exercised by the directors of the Shropshire Union."

By § 11, it was enacted, that "when and as each of the railways shall be completed and opened, the same shall be worked and used by the London and Northwestern Railway Company;" and specific provisions were made in relation to the mode of use.

The 19th section enacted, that "when any one of the said railways shall have been completed before the completion of all such railways," a calculated portion of the rent should become payable.

The 24th section enacted, "that until the lease of the said railways hereby authorised shall be completed, all the profits derived from so much of the canals, and the works and property connected therewith, of the Shropshire Union Railways and Canal Company, as shall not have been converted into or used for the purposes of the said railways, shall be applied in the first place in payment of the interest on the canal debt of the said company, or so much thereof as shall not be payable by the London and Northwestern Railway Company."

The 26th section enacted, that "after the completion of the said railways, the Northwestern Company shall defray all necessary charges of the Shropshire Union Company, for the transaction of their current business and the execution of the powers which may remain vested in them, in relation to their several concerns, in addition to the rent payable on the said leases."

The 31st section enacted, that it "shall not be lawful for the Shropshire Union Railways and Canal Company, by virtue of the powers hereinbefore contained, to demise or lease, nor for the said London and Northwestern Railway Company, to enter into and accept, such lease of the undertaking of the first-mentioned company, unless it shall have been proved to the satisfaction of the commissioners of railways, and certified by them under their seal previous to the execution of such lease," that one half of the capital had been paid up, &c.

company respectively. It recited the matters already stated, and then proceeded to stipulate, 1st. "That the Shropshire Union or the Northwestern Company shall at all times during the continuance of any such lease authorised to be granted by such Act, keep a separate account of all passengers, &c. which such companies, or either of them, shall carry from Shrewsbury or Wellington, or from any point between those two places to Rugby, or to any place on the London side of Rugby on the line of the Northwestern Company, and also of passengers which such companies, or either of them, shall carry from Rugby, or any place to the south of Rugby on the line of the Northwestern Company, to Wellington or Shrewsbury, or to any point between the two last-named places. And the Shrewsbury and Birmingham shall keep a separate account of all passengers, &c. which such company *shall *118 carry from Shrewsbury or Wellington, or from any point between those two places to Rugby, or any place on the London side of Rugby upon the line of the Northwestern Company, or to London, either upon the last-mentioned line or upon that of any other company."

2dly. "That the Shropshire Union or the Northwestern Company on the one part, and the Shrewsbury and Birmingham on the other, shall respectively make out a half-yearly account in abstract of all the matters mentioned in the first article, which accounts were to be audited, and the auditors were to determine how much of the monies had been received in respect of the distance from Shrewsbury or Wellington, or from any point between those two places to Stafford or Wolverhampton, or from Stafford or Wolverhampton to Shrewsbury or Wellington, or to any point between these two places; and such sum, when so ascertained, shall be divided between the said Shropshire Union Company and the Northwestern Company as one party, and the Shrewsbury and Birmingham Company as the other party, in the following proportions (that is to say): six thirteenth equal parts to the Shropshire Union Company and Northwestern Company, and the remaining seven thirteenth equal parts to the Shrewsbury and Birmingham Company, those proportions being considered as substantially corresponding with the relative lengths of the lines of the Shropshire Union Railways and Canal Company from Wellington to Stafford, and the line of the Shrewsbury and Birmingham Railway Company from Wellington to Wolverhampton."

3dly. "That during the continuance of any such lease as aforesaid, neither the Shropshire Union Company nor the London and Northwestern Company shall convey passengers from Shrewsbury or Wellington, or from any point between those two places to any point or place on the line of the Shrewsbury and *119 Birmingham Railway * or the Birmingham, Wolverhampton, and Stour Valley Railway, nor use the line of the Shropshire Union Railway by Gnosall or Stafford, to compete for any traffic which properly belongs to the Shrewsbury and Birmingham Railway."

4thly. "That the agreement hereby come to shall not in any manner be evaded or eluded by either of the contracting parties; nor shall any arrangement, scheme, device, or contrivance be resorted to or attempted for that purpose"; and in case of any dispute it was to be referred, at the request of either of the said companies, to the arbitration of an umpire appointed by the Railway Commissioners.

5thly. It was provided that it should be lawful for the Shrewsbury and Birmingham Company to put an end to this agreement by six months' notice in writing, to be given to the Shropshire Union Company.

The only part of the Shropshire Union line which was ever completed was that from Shrewsbury through Wellington to Stafford, which was in use prior to the month of October, 1849, but no other part of that line has been completed, and no lease of the whole "undertaking" has been granted to the Northwestern Company.

The appellants' railway was completed and opened for public use and traffic on the 13th November, 1849. Previously thereto the appellants gave notice to the respective secretaries of the respondents of the intended opening of their railway, and upon the same being opened they called upon the London and Northwestern Railway Company to keep the accounts stipulated for by the above-mentioned agreement. This demand was not complied with.

On the 17th December, 1849, the appellants filed a bill, setting forth all these facts, and praying for specific performance of the agreement. The respondents demurred, and the demur- *120 rers were allowed by the Vice-Chancellor * of England.

An appeal was presented to Lord Chancellor Cottenham, who, on the 23d February, 1850, overruled the Vice-Chancellor's

decision.¹ Application was thereupon made, that "as the construction of the agreement was a legal question, the defendants might have the opportunity of taking the opinion of a Court of law," but the Lord Chancellor postponed any order on that application till the cause should have been heard. An order was, on the 23d March, 1850, obtained from the Vice-Chancellor of England for an injunction to restrain the defendants from violating the articles of agreement; the defendants (having put in their answer) moved, before Lord Chancellor Truro, to dissolve the injunction. His Lordship dissolved the injunction, leaving the plaintiffs at liberty to bring such action as they might be advised.² An action of covenant was afterwards brought in the Court of Queen's Bench; the fifth breach assigned was that the defendants "did evade and elude the covenants and agreements, and each of them in the indenture contained"; and to this breach the defendants, after oyer, demurred generally. The Court pronounced judgment for the plaintiffs, holding that the agreement was not illegal or a fraud on the Legislature.³ Another motion for an injunction was then made, but it stood over till the hearing of the cause. The Master of the Rolls, on the hearing, thought that Lord Cottenham must be taken as having inferentially decided that the contract was not *ultra vires*; but his Honour held that it had no operation until all the lines had been finished.⁴ The case then came on appeal before the Lords Justices, who held that the contract was *ultra vires* and ought not to be specifically performed; that if valid it would come into operation, although only a portion of the * projected lines *121 had been completed; that the directors of a railway company are trustees of their statutory powers, and that an agreement entered into by them on behalf of the company, amounting to a breach of trust, could not be enforced to the prejudice of the shareholders.⁵

This was an appeal against that decree.

When this case was called on for argument,

LORD ST. LEONARDS and LORD WENSLEYDALE stated that they were shareholders in the London and Northwestern Railway Company, and proposed to retire.

¹ 2 Macn. & G. 324.

⁴ 16 Beav. 441.

² 3 Macn. & G. 70.

⁵ 4 De G., M. & G. 115.

³ 17 Q. B. 652.

The counsel for the appellants said that they should be perfectly satisfied that their Lordships should take part in the decision of the case.

Their Lordships, however, retired.

Mr. Rolt and *Mr. Markham Giffard* for the appellants. — There is clearly a power in the directors of a railway company to make an agreement like the present; that general right is given by the 8 & 9 Vict. c. 20, § 87; and Lord Chancellor Cottenham and the Court of Queen's Bench treated this contract as legal. But then it is said that even assuming it to be legal as a mere agreement, it never came into operation, because the Shrewsbury Union never granted a lease of its "undertaking" to the London and North-western, and the agreement was only to take effect "during the existence of the lease"; this objection is invalid. As each one of the lines intended to constitute the Shropshire Union Railway is completed, the Northwestern is to take possession of it and to pay a rent for it; Lord Cottenham was clearly of opinion that, taking into consideration the provisions of the Leasing Act, such * 122 was the proper and reasonable * construction of the agreement;¹ and his Lordship was equally of opinion that there had been no fraud on Parliament in this arrangement. Two companies, like two traders, may make an agreement of this sort, and the directors of a company, acting for their company, of which they are members, and in the success of which they are interested, may make such an agreement in the sound exercise of the discretion vested in them; the case was therefore put on too narrow a ground by Lord Justice Turner when he said that it² "depends on the true meaning of the words, 'during the continuance of any such lease authorised to be granted by such Act,' which are contained in the first clause of the agreement." The cases of *The Great Northern v. The Eastern Counties*³ and *Simpson v. Denison*,⁴ do not affect the present, nor does that of *McGregor v. The Dover and Deal Railway Company*; ⁵ or *The South Yorkshire Company v. The Great Northern Company*; ⁶ for all these depended on facts peculiar to each of them, and they show that agreements, which are in contradiction to the express provisions, or the clearly im-

¹ 2 Macn. & G. 347.

² 4 De G., M. & G. 129.

³ 9 Hare, 306.

⁴ 10 Hare, 51.

⁵ 7 Railw. Cas. 227.

⁶ 3 De G., M. & G. 576.

plied intention of the Acts creating the company, can alone be treated as invalid: nothing of that sort can be alleged here.

If directors of a company, with a full knowledge of the circumstances (which knowledge they did possess here), enter into a contract, they cannot be relieved against performing it, on any supposition of public policy; and here, too, the parties seeking to compel performance have done nothing to disentitle themselves to the assistance of a Court of equity. *Macgregor v. The Dover Railway*¹ * shows that it is only where the stipulations of a contract made for a company render it clearly illegal, that the Courts will refuse to enforce it. The opinion of Lord Justice Knight Bruce was founded on *Mortlock v. Buller*,² but that relates only to ordinary trustees, and the directors of a railway company do not bear that character, *Mozley v. Alston*.³ *123

The respondents here cannot be allowed to argue that the agreement has not come into operation, for they have actually received the benefit, which was the consideration given for it, and the appellants cannot now be restored to the situation in which they originally stood. The completion of the whole of the lines is immaterial; the important matter of the agreement was to put the Northwestern Company into possession of the line between Stafford and Wellington, by which it would be best enabled to enter into competition with the Shrewsbury and Birmingham Company. By force of the agreement the Northwestern Company got possession of that line, and has therefore enjoyed all the benefits which the agreement professed, or was ever expected to give. All the arrangements respecting competition had reference to that particular matter, and were introduced almost wholly with reference to that, and to that alone. The fourth clause of this agreement declares that neither party shall elude or evade this agreement, and in *Lumley v. Wagner*,⁴ where all the authorities were most fully discussed, the Court interfered to prevent the violation of a negative stipulation, although it could not enforce the performance of the whole of the contract itself. A similar principle must be adopted here, and the order for the injunction is at all events perfectly valid.

* *The Attorney-General (Sir R. Bethell) and Mr. Follett* * 124

¹ 18 Q. B. 618.

² 1 Phill. 790.

³ 10 Ves. 292. See 2 Dow, 515.

⁴ 1 De G., M. & G. 604.

(*Mr. Speed* was with them) for the respondents.¹— This agreement is illegal, being against public policy ; it purports to affect only a part of the line, but if it could be made as to part, why not as to the whole ? One railway cannot agree with another to put an end to competition. The Legislature grants certain powers to a company to be used for the benefit of the public, and in that way as the means of profit to the company. These powers can only be used in the manner, and for the purposes specified in the Acts which confer them. The Statute 8 & 9 Vict. c. 96, prohibits any railway company from granting or accepting any lease of any other railway created under any Act of that session, unless under a distinct provision of an Act specifying the names of the parties. That enactment shows that the Legislature was adverse to this kind of leases. *Natusch v. Irving*, and other cases cited in *Gow on Partnership*,² show general principles which are applicable to the authority of directors and must regulate this matter. They were practically applied in *The East Anglian v. The Eastern Counties Company*,³ *The Great Northern v. The Eastern Counties*,⁴ *Gage v. The Newmarket Railway Company*,⁵ *Macgregor v. The Dover and Deal Railway Company*,⁶ *Beman v. Rufford*,⁷ *Myers v. Watson*,⁸ *The Mayor of Norwich v. The Norfolk Railway Company*.⁹

[THE LORD CHANCELLOR, *prima facie*, a corporation may
 * 125 * contract under seal. You must show that the particular contract is one which the corporation has no power to enter into. It must be shown on the face of it to be a breach of duty, something foreign to the object for which the company was established.] This agreement clearly falls within that description, for its object is to hand over to one company the business, to transact which it had received the authority of the Legislature.

Then again, the agreement is void for want of mutuality, for while it binds the Northwestern Company for ever, it only binds the Shrewsbury and Birmingham Company during pleasure. It

¹ A preliminary objection was made to the right of the appellants to sue for specific performance of this contract, on the ground that by the 17 & 18 Vict. c. 222, the appellants' company had been incorporated with the Great Western Company. As this point was not noticed in the judgment, the arguments on it have been omitted.

² 2d edit. Appendix II. 404.

³ 7 Railw. Cas. 150, 11 C. B. 775.

⁴ 9 Hare, 310.

⁵ 18 Q. B. 457.

⁶ 18 Q. B. 615.

⁷ 7 Railw. Cas. 48.

⁸ 1 Sim. N. S. 528.

⁹ 4 Ellis & B. 397.

is besides so grossly imprudent and unfair, with relation to the interests of the shareholders of the Northwestern Company, that equity will not enforce it.

Then comes the important question, whether the obligations of the agreement had arisen at the time of filing the bill. The Act was recited in the agreement, but the Act did not authorise any such lease as was there described, nor any lease except a lease of the whole undertaking. The operative words of the agreement being plain, they cannot be controlled by the mere recital. Lord Cottenham, when the case was before him, said that the Act itself became a lease of part of the line, and that therefore when the line between Shrewsbury and Stafford was completed, that line became thereby leased, and in that way he dispensed with the certificate of the Railway Commissioners. But that mode of viewing the question was altogether incorrect, for it was using the recital to explain and extend the contract. Again, if he was right, the Court of Queen's Bench was in error, for that Court, though it supposed that such a lease might be valid, held that no action was maintainable without the direct allegation that a lease had been granted, and that there had been an entry under the lease. Now, no such averment could be made, as to the

* whole of the line, for it had not been completed, and no *126 lease of it had been or could then be granted. That the two things are very different is shown by this, that under the lease there would be a power to fix the tolls, but that till the lease is granted no such power exists. And the 26th section of the 10 & 11 Vict. c. 222, shows that when the lease has been granted the Northwestern Company is to defray all the charges of working the line, as well as to pay a rent for working it. The 31st section prohibits the Shropshire Union Company from granting a lease, until there has been a certificate from the Commissioners of Railways, but the judgment of Lord Cottenham altogether strikes that provision out of the Act, and gives effect to the agreement, though the condition on which it is to take effect, namely, the granting of a lease by the Shropshire Union Company, has not been performed.

The Act of Parliament is divisible into two parts, one part defines what shall be the relation of the lessor and lessee, under the lease to be granted; the other consists of a variety of provisions relating to the powers of the Shropshire Union Company and the Northwestern Company, in the intermediate period pending the

construction of the lines, and until the lease of the whole undertaking is granted. These relations are entirely different during the two different periods.

The thing to be performed is thus incapable of being clearly and undoubtedly pointed out, and in such a case a Court of equity will not decree specific performance, which is not the absolute right of a suitor, but is governed by the discretion of the Court, *Myers v. Watson*,¹ but will leave the party seeking it to his remedy at law. The Court must in like manner refuse to continue the injunction granted by Lord Cottenham, restraining the * 127 Northwestern * from entering into a competing traffic.

No one can truly say what this competing traffic is, for when a man is at Birmingham, and is going to Shrewsbury, he can no more be said to belong as a passenger to the Shrewsbury line than to the Northwestern line. He may go by either at his convenience. Here, however, there was no evidence of undue competition on the part of the respondents, while there was ample evidence to show that the appellants carried on a competition which was intended on all sides to be prohibited. The amalgamation of the Shrewsbury and Birmingham with the Great Western involves the necessity of the complete determination of the agreement with the Northwestern, for it was essential to that agreement that the Shrewsbury and Birmingham Company should preserve the right of using the Stour Valley line, without which the Northwestern Company could not operate in the manner proposed, not even in carrying to Rugby, and this right was expressly put an end to by the enactments contained in the 12th section of the 10 & 11 Vict. c. 120.²

Mr. Willcock appeared for the Shropshire Union Company, but as he adopted the argument of the Attorney-General for the Northwestern Company, he was not heard.

Mr. Rolt replied. An agreement of this kind may be legally

¹ 1 Sim N. S. 528.

² The Act recited a previous Act for making the Stour Valley line and giving the use of it to the Shrewsbury and Birmingham Company and then contained this proviso: "Provided that the power hereby conferred on the Shrewsbury and Birmingham Company shall cease and be void, in case the said company shall be leased to, or purchased by, or amalgamated with, the Great Western Company," &c., &c.

made. The 8 & 9 Vict. c. 96, only prescribed * the adoption * 128 of a certain form with respect to those contracts which the 8 & 9 Vict. c. 20, § 87, had permitted.

The agreement came into operation as each portion of the line was completed. The first section of the 10 & 11 Vict. c. 121, speaks not only of "the completion of the works of the railways," but also of "such earlier period as may be agreed on by the said companies," as the time at which the lease may be granted and accepted; and the 11th section expressly says that "when and as each of the railways shall be completed and opened" it shall be worked by the Northwestern; and the 19th section makes the rent payable when "any of the said railways shall have been completed." The lease therefore, so far as this agreement is concerned, is in force, and "during its continuance" this agreement must be performed.

May 13.

THE LORD CHANCELLOR, after very fully stating the facts of the case, and the various proceedings in the Courts below, said: I have given to this case my most anxious attention, and I have come to the conclusion that the Master of the Rolls was right in the construction which he put on the statute and on the articles of agreement, and that the bill was therefore properly dismissed by him.

It appears to me clear that the Act only authorised the granting of one lease, i. e. a lease of the whole undertaking. The only section expressly authorising the grant of a lease is the first section (his Lordship read it).

Therefore that first section was a section authorising and compelling the Shropshire Union Railways and Canal Company, when the three railways should be completed, or sooner (upon their obtaining a certain certificate), if both parties agreed, to grant, and imposing on the Northwestern * Railway Com- * 129 pany the duty of accepting a lease of the undertaking (which means the whole undertaking), at a rent ascertained in a particular mode [his Lordship then read the 2d, 11th, and 19th sections, see ante].

It thus appears that the lease was to be granted on the completion of the works, i. e. the whole of the works of the three railways, or at such earlier period as might be agreed upon. But then by a

subsequent clause, section 31, this power of agreeing to the grant of the lease before the completion of the works, is restrained by an enactment that no lease shall be granted until it shall have been proved to the satisfaction of the Commissioners of Railways that one half of the capital has been actually paid up and expended, i. e. one half of the capital to be raised for the purpose of constructing the three railways. These enactments seem to me clearly to point to one lease and one lease only, and that a lease of the whole undertaking, and I can discover nothing in the Act authorising any other lease. Section 2 provides, that from the passing of the Act the undertaking shall, subject to the provisions of the Act, be managed by a joint committee, consisting of eight directors of the Shropshire Company, and eight of the Northwestern Company; and they by subsequent sections are to superintend the construction of the railways, and the raising of money for the purpose under the powers given to the Shropshire Company.

Although, however, the lease was to be a lease of the whole undertaking, yet it could hardly happen that all the three lines would be completed at the same time; and therefore it became necessary to provide for the course to be pursued, as each of the three lines should from time to time be completed. This is provided for by

section 11, which I have read. This section provides that * 130 as each * railway is completed, the Northwestern Company shall be put into possession of it, and shall work the same under the direction and superintendence of the joint committee. And then section 19, which I have also read, provides for the amount of rent to be payable during this period of intermediate enjoyment. The amount of rent is not, it will be observed, a rent dependent merely on the amount of capital expended in the formation of the completed railway. The rent to be payable on the completion of whichever of the three lines shall be first completed, is to be not merely the amount of interest on the capital expended in the formation of the completed railway, and on the money, if any, borrowed for that purpose, such interest being calculated at the rate stipulated for in the first section, but also the amount of interest on the whole of the canal capital. So again, when a second line is completed, the rent for that second line is to be not merely the amount of interest on the money employed in its formation, but also one half of the interest payable on the canal debt. And the aggregate of these two rents thus ascertained is to

be the rent payable until the rent to be reserved on the lease shall become payable, i. e. until the third line also is completed, when the rent stipulated for in the first section will become payable.

I think it clear, attending to these different provisions, that the Legislature contemplated but one lease, and that a lease of the whole undertaking; but that in the mean time, as each railway was finished, the Northwestern Company was to be put into possession of it, subject however to the control of the joint committee, and paying a rent calculated according to the provisions contained in the 19th section.

If on the completion of one of the three lines, the Shropshire Company had granted a lease under its common * seal * 131 to the Northwestern Company, it would have been doing, or attempting to do, something *ultra vires*. A railway company certainly cannot grant a lease except where it is authorised to do so by Parliament, and though by the terms of the eleventh section, the Northwestern Company is entitled to possession of each line as it shall be completed, paying a rent to the Shropshire Company, yet the Northwestern would hold not strictly as lessee deriving title under the Shropshire Company as lessor, but by virtue of the special provisions of the Act of Parliament. I think, therefore, that inasmuch as the whole undertaking had not yet been completed, the time had not arrived when the Shropshire Company had authority to grant a lease.

But assuming this to be so, still it was argued that the question is not whether the Northwestern Company, from the time when it was put into possession under the 11th section, was holding under a lease, but whether the holding under the provisions of the 11th and 19th sections of the Act, is or not what was intended by the articles of agreement under the words, "during the continuance of any lease authorised by the Act." It was contended at your Lordships' bar, that even though there was not authority to grant a lease of one only of the lines before the others were completed, yet the covenants were clearly meant to be in force as soon as the Northwestern Company should be, whether as lessee, or by any other title, in actual possession of the line between Shrewsbury and Stafford. It was the possession of that line which would enable the Northwestern to enter into competition with the Shrewsbury and Birmingham Company, and therefore it was argued that the covenants which were intended to prevent the ill consequences

of competition, must have been meant then to come into
 * 132 operation. This, my Lords, is the part * of the argument
 which appeared to me to have the greatest force. But after
 much consideration I have come to the conclusion that it cannot
 be supported.

The articles of agreement recite the introduction into Parlia-
 ment in the then last session of a bill "for authorising a lease in
 perpetuity of the undertaking of the Shropshire Union Company
 to the Northwestern Company," and that "the same was opposed
 by the Shrewsbury and Birmingham Company," and that before
 the passing of the Act, "the Shrewsbury and Birmingham Com-
 pany agreed to withdraw their opposition," on an agreement
 "that the covenants hereinafter contained should be entered into
 on an Act being obtained, authorising such lease as aforesaid"
 (i. e. a lease of the undertaking, which means the whole under-
 taking), "or a lease of any part of the undertaking between
 Shrewsbury and Stafford." Then it is recited that such an Act
 was obtained during the last session of Parliament, and then the
 three parties to the articles enter into the covenants therein con-
 tained.

The covenants, therefore, were to be entered into on the happen-
 ing of either of two events, either on the passing of an Act au-
 thorising the lease of the whole undertaking, or on the passing of
 an Act authorising the lease of the line between Shrewsbury and
 Stafford; for that, I think, must have been what was intended by
 the words (inaccurate no doubt) "a lease of any part of the
 undertaking between Shrewsbury and Stafford." The articles
 then recite that such an Act was obtained. And this is true, be-
 cause an Act was obtained according to the first alternative, i. e.
 an Act authorising a lease of the whole undertaking. The cov-
 enants, therefore, were to be entered into, and accordingly the
 directors of the Northwestern Company covenanted that
 * 133 "during the continuance of any such lease * authorised to
 be granted by such Act," they would do that of which the
 bill in this cause seeks the specific performance. The question is,
 what lease is there referred to? It must be the lease which had
 been referred to in the recital, as the lease which had been author-
 ised by the Act, and that was a lease of the whole undertaking.
 This is the strict construction of the language used, and an adher-
 ence to its literal meaning leads to no absurdity or inconvenience.

It does not, it is true, give rights to the appellants in circumstances which we may consider were substantially the same as those in which both parties would have been placed if the whole undertaking had been completed, and a lease of it had been granted pursuant to the Act. But, on the other hand, the Northwestern directors may well say that they would not have bound themselves by any covenant more extensive than what the words import, and would not have agreed to fetter their free agency as to the management of their concerns if the restrictions were to arise before the whole undertaking was actually demised to them. There is nothing to guide us to the meaning of the parties except the language which they have used. It may be that the construction I put upon this language is one which confers less benefit on the Shrewsbury and Birmingham Company than that company had looked for. But the answer is: it gives all which the words import, and it may be all which the other parties to the contract intended.

I think, moreover, it is right to add that there appears on the face of the agreement itself, a stipulation which seems to show that its framers must have looked to a lease more extended than that which should be confined to the line from Shrewsbury to Stafford. The third clause or section of the articles provides amongst other things, "that during the continuance of any such lease as aforesaid, the *Northwestern Company shall not use the line *134 of the Shropshire Union Company by Gnosall or Stafford to compete for any traffic, which properly belongs to the Shrewsbury and Birmingham Railway." Now, one of the three projected railways which was to form part of the whole undertaking to be eventually leased to the Northwestern Company was a line running from the north through Gnosall to Wolverhampton. This formed no part of the line from Shrewsbury to Stafford, and therefore the engagement by the Northwestern directors that "during the continuance of any such lease as aforesaid," they would not use the line by Gnosall to compete with their rivals necessarily presupposes that "such lease as aforesaid" would be a lease which, but for this stipulation, would enable them to compete by the line from Gnosall, i. e. that the lease referred to in the articles is a lease which would include the direct line from Gnosall to Wolverhampton, and this must be the lease of the whole undertaking. I do not forget that the line from Shrewsbury to Stafford runs through

Gnosall, and so it may be said that the stipulation might refer to traffic passing through Stafford, but this is not a reasonable construction of the agreement, if we bear in mind that a part of the general undertaking was a line direct from Gnosall to Wolverhampton, and that the mention of Gnosall was altogether unnecessary if the traffic referred to was only that which goes round by Stafford.

I am, therefore, of opinion with the Master of the Rolls that the time had not arrived when the covenants entered into by the respondents had come into operation, and so that he properly dismissed the bill.

This view of the case is, as I conceive, strictly conformable to the judgment at law of the Court of Queen's Bench. For * 135 that Court held that no action could be maintained for * a breach of any of the covenants, except that for evading and eluding the contract, without a distinct averment that a lease had been granted pursuant to the Act, and from what passed on the first argument, when leave was given to amend, it is plain that the Court considered that without an averment, not only that the lease had been granted, but also that the Northwestern Company had entered and was possessed of the line by virtue of the lease, no action could be maintained; in other words, that in order to maintain an action it was not enough to show that the Northwestern Company had entered and was in possession under the provisions of the 11th section of the leasing Act, but that the plaintiffs must show further that the possession of the Northwestern Company was, by virtue of a lease, granted in pursuance of the Act.

This being the ground on which I recommend your Lordships to affirm the judgment below, it is not, in strictness, necessary for me to express any opinion as to the grounds on which the case of the appellants failed before the Lords Justices. But it is due to those very learned Judges to say that I by no means wish it to be understood that I have formed an opinion adverse to that which either of them took of the case. Lord Justice Turner was of opinion that the contract sought to be enforced was *ultra vires* of the contracting parties. There have been a great many cases on this subject, i. e. what contracts are and what are not *ultra vires* of a railway company established by Act of Parliament. I agree to the proposition urged by the appellants that, *prima facie*, corporate bodies are bound by all contracts under their common seal. When

the Legislature constitutes a corporation it gives to that body *primâ facie* an absolute right of contracting. But this *primâ facie* right does not exist in any case where the contract is one which, from the nature and object of * incorporation, the corporate * 136 body is expressly or impliedly prohibited from making; such a contract is said to be *ultra vires*. And the question here, as in similar cases is, whether there is any thing on the face of the Act of incorporation which expressly or impliedly forbids the making of the contract sought to be enforced.

There is abundant authority to show that there are many contracts into which, without express authority, a railway company cannot enter. The Railway Clauses Consolidation Act (the 8th Vict. c. 20, § 86) authorises every such company to run carriages and generally to act as a carrier on its own line of railway, and by the next section the company is enabled to make arrangements with other companies having continuous railways for the use of their respective lines for their mutual benefit. All this would have been unnecessary if it had not been considered that but for such enactments no such power would have existed under the mere incorporation of the company for the purpose of making and maintaining a railway. The principle has been often recognised and acted on in Courts of law and equity. In the case of *The East Anglian Railway Company v. The Eastern Counties Railway*, it was held by the Court of Common Pleas that no action could be maintained on the covenant of the defendants to accept a lease of the railways of the plaintiffs, to find the capital for constructing the railways and to pay the costs of promoting certain bills then pending in Parliament. The covenant was held to be void, being a covenant to do acts not within the objects of the incorporation.

In a subsequent case, viz. *The South Yorkshire Railway and River Dun Company v. The Great Northern Railway Company*,¹ the same proposition is stated, more correctly perhaps, by Mr. Baron Parke. He there says that "where * a corpora- * 137 tion is created by Act of Parliament for particular purposes with special powers, their deed, though under their corporate seal, does not bind them if it appears by the express provisions of the statute creating the corporation or by necessary or reasonable inference from its enactment that the deed is *ultra vires*, that is, that the Legislature meant that such a deed should not be made." I think

¹ 9 Exch. 75 - 84.

this is the more correct way of enunciating the doctrine, though practically it makes very little difference whether we say that the railway company has no authority given to it by its incorporation to enter into contracts as to matters not connected with its corporate duties, or that it is impliedly prohibited from so doing, because by necessary inference the Legislature must be considered to have intended that no such contracts should be entered into.

The numerous cases in equity in which the Court has restrained a company from devoting any part of its funds to purposes not strictly within the objects of its incorporation have been decided on similar principles. It is sufficient to refer to the cases of *Coleman v. The Eastern Counties Railway Company*,¹ and *Bagshaw v. The Eastern Union Railway Company*.² In the former case Lord Langdale sustained an injunction restraining the defendants from applying any part of their funds towards the establishment of a Steam Packet Company which they considered, and probably justly considered, would be likely to benefit their line. And in the latter case it was decided that money raised for the purpose of completing a particular branch line could not be applied to the purposes of any part of the main line.

* 138 * The Court, in those and all similar cases, has considered (to apply the language of Mr. Baron Parke) that by reasonable inference from the nature of the incorporation, the Legislature intended that no such appropriation of the funds as the company contemplated should be made.

I will only add that in the case of the *Helensburgh Harbour Trustees v. The Caledonian Railway Company*,³ your Lordships, last year, acted on the same doctrine.

Lord Justice Turner was of opinion that the doctrine in question was applicable to the present case; that the contract sought to be enforced was one not authorised by the terms of the incorporation; I confess that, were it not for the very high authorities opposed to the opinion of the Lord Justice, I should have been inclined to attribute great weight to it. The contract on the part of the Northwestern Company is a contract to give up to the Shrewsbury and Birmingham Company seven thirteenths of the profits made by the carriage of passengers and goods over a portion of that line, in consideration of receiving in return six thir-

¹ 10 Beav. 1, 4 Railw. Cas. 513.

² 2 Macqueen's Sc. App. Cas. 391.

³ 7 Hare, 114, 2 Macn. & G. 389.

teenths of the profits made by the Shrewsbury and Birmingham Company on a certain portion of that line ; but if this could be done on a portion of the line, why, it was urged at the bar, not on the whole ? The doctrine of the respondents, it was contended, would necessarily lead to the conclusion that the Northwestern Company and the Great Western Company might, if they chose, agree to bring all their profits into a common fund, and divide them among their respective shareholders in any definite stipulated proportion. This is a question of very great importance. The opinion of the Lord Justice Turner seems to be opposed to that of Lord Cottenham, and I cannot reconcile *it with the judgment of the Court of Queen's Bench *139 on the argument of the demurrer to the fifth breach, for that demurrer clearly raised the question whether the contract for division of the profits was or was not a legal contract. In this conflict of opinions, if it had been necessary to decide between them, I should probably have advised your Lordships to require that the case on this point should be reargued in the presence of the learned Judges, in order that we might have their assistance. But, as I have already stated, I think there is another ground on which your Lordships must decide against the appeal, so that the further discussion of the doctrines on which the Lord Justice Turner rested his judgment is unnecessary.

The ground on which Lord Justice Knight Bruce rested his judgment was, that even supposing the covenant was not legally invalid, as being *ultra vires*, as to which he expressed no opinion, still it was one to the enforcing of which a Court of equity ought not to lend its assistance, being palpably so unequal, and therefore so unjust in its operation, as fairly to lead to the inference that its effect could not have been fully apprehended by the parties, or at all events by the party against whom it is sought to be enforced.

It is obvious that if the Northwestern Company is bound by this covenant, the Shrewsbury and Birmingham Company ceases to have any object in carrying passengers or goods to Rugby, or beyond Rugby to London. Indeed it is manifestly the interest of the Company not to do so, for it would be incurring all the expense of running carriages over the line, on their way to Rugby and the South, without any possible countervailing benefit. By the terms of the contract the Shrewsbury and Birmingham Com-

pany is to have seven thirteenths of the profits of so much of the through traffic carried by the Northwestern Company, as is

*140 attributable *to the distance from Shrewsbury to Stafford, and it is also to have seven thirteenths of so much of the through traffic on its own line as is attributable to the distance from Shrewsbury to Wolverhampton. The effect of this arrangement obviously is to prevent the Shrewsbury and Birmingham Company from having any interest in carrying traffic by its own line. If the directors of that company were to cease altogether to carry passengers or goods beyond Birmingham, the result must necessarily be that all the traffic from Shrewsbury to Rugby and the south must go via Stafford, and be conveyed, therefore, by, and at the cost of the Northwestern Company, without any cost whatever to the Shrewsbury and Birmingham Company, and yet for all this traffic so conveyed the Shrewsbury and Birmingham Company would be entitled to precisely the same proportions of profit as if the goods and passengers had been carried over that line, and at the expense of that company. And on the other hand, the Northwestern Company would be bound to hand over to the Shrewsbury and Birmingham Company seven thirteenths of the profits derived from the working of a portion of the Northwestern line without receiving any corresponding share of profit from the Shrewsbury and Birmingham Company. It is difficult to suppose that this could have been intended, more especially as it is a contract binding for ever on the Northwestern Company, though the Shrewsbury and Birmingham Company has the right of abandoning it at any time. The effect of the arrangement was to divert from its legitimate channel no inconsiderable portion of the profits of a particular part of the line of the Northwestern Company, without securing any corresponding portion of profits from the rival line. It therefore seems to me that there is great force in what was said by Lord Justice Knight Bruce, namely,

*141 "that the contract, whether legally valid or invalid, *is one which a Court of equity ought not to be active in enforcing."

I have thought it right to make these observations, but I must repeat that the ground on which I advise your Lordships to reject this appeal is that whatever be the character of the covenants in question, the time had not arrived at which they were to come into operation. This extends to the whole case, and I

shall, therefore, move your Lordships to dismiss the appeal with costs.

Decrees and orders appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 13th May.

1857. June 19, 22, 23, 25 ; July 9.

RICHARD O'FLAHERTY and others, creditors of the	} <i>Appellants.</i>
Tipperary Bank,	
GEORGE M'DOWELL, official manager of the said	} <i>Respondents.</i>
Bank, the ATTORNEY-GENERAL, and others, . . .	

*Statutes repealed and in Force. Bankers. Joint Stock Companies.
Bankrupt Law Pleading.*

An affirmative statute, giving a new right, does not of itself and necessarily destroy a previously existing right, created by another statute to which it does not refer ; but will do so, if it appears to have been the intention of the Legislature that the two rights should not exist together.

The Irish Statute 38 Geo. 2, c. 14, is repealed, so far as joint stock banks in Ireland are concerned, by the imperial Statute 6 Geo. 4, c. 42, though the former is not mentioned in the latter statute, the provisions of the two statutes being entirely incompatible with each other.

A joint stock banking company in Ireland is within the provisions of the 8 & 9 Vict. c. 98.

A petition of certain persons under the 33 Geo. 2, c. 14 (Ir.), on behalf of themselves and all the creditors of an Irish bank, for administration of assets, under the trusts of that statute, is informal. It ought to be, in any case where it can be maintained, a petition on behalf of all the creditors of the persons constituting the bank, the provisions of that statute affording a remedy not exclusively for debts owed by those persons in respect of the bank, but for their debts generally.

Fawcett v. Hodges, 3 Ir. Eq. Rep. 232, overruled ; *Hayden v. Carroll*, 3 Ridg. Parl. Cas. 545, questioned.

THIS was an appeal against an order of the Lord Chancellor of Ireland, dismissing a petition which had been filed by the present appellants, on behalf of themselves, and all the other creditors of the "Tipperary Joint Stock Bank," praying that "the trusts of the

Act 33 Geo. 2, c. 14 (Ir.), might, as to the said creditors of the Tipperary Bank, be carried into execution under the direction of the Court, and that the petitioners, and the other creditors * 143 of the * said banking copartnership, might be paid their demands out of the joint and separate property of the members thereof."

"The Tipperary Joint Stock Bank" had been established in 1838, under the provisions of 6 Geo. 4, c. 42, and was regulated by an indenture dated 5th July, 1842, by which it was agreed that the object of the copartnership should be to establish, in any cities, towns, and places in Ireland, and in any other places the directors might think proper, banks and agencies, and thereby to carry on the business of bankers. The company or copartnership consisted of a large number of individuals, who subscribed for shares, and its business was managed by a board of directors. In February, 1856, the bank stopped payment, and the petition of the appellants was thereon presented. Other proceedings were instituted by other individuals, likewise creditors of the bank, under the Joint Stock Companies' Winding-up Acts, and the respondent, M'Dowell, was, under them, appointed official manager. The main question raised between these parties was, whether the 33 Geo. 2, c. 14 (Ir.)¹ applied to a bank established under the 6 Geo. 4, * 144 c. 42, or whether the latter statute had * not, in effect, repealed the former. The Lord Chancellor was of opinion

¹ There were several statutes referred to in the argument and judgment. The following summary of them is all that is necessary to be given. The 8 Geo. 1, c. 14 (Ir.), and the 29 Geo. 2, c. 16 (Ir.), made special provisions for the government of banks and bankers in Ireland. Then came the 33 Geo. 2, intituled "An Act for repealing the 8 Geo. 1, c. 14, and for providing a more effectual Remedy for the Security and Payment of Debts due by Bankers." It enacts first, that the 8 Geo. 1 shall be repealed; secondly, that all deeds and conveyances made by any banker or bankers, whereby any part of their real or leasehold estate shall be granted, released, sold, mortgaged, demised or any way encumbered or affected, other than leases not exceeding three lives or thirty-one years, at the full improved rent, without fine, shall be registered within one month from the execution of such deed or conveyance; and if such deed or conveyance be executed by the banker out of the kingdom, then within three months from its execution, otherwise the same shall be void against the creditors of the banker, though made for valuable consideration; thirdly, that all grants, sales, alienations, leases, or dispositions to be made by any banker, during the time he is a banker, of any part of his real estate or of any leasehold interest to him belonging, to, or to the use of, or in trust for any son or grandson, daughter or granddaughter of such

that the earlier statute did not apply, and therefore dismissed the petition. The appellants appealed against that decision.

banker, shall be utterly void as against the creditors of the banker, though made for valuable consideration, and though the creditors were not creditors of the banker at the time such grant or disposition was made. Then it provides that bankers shall not issue notes or accountable receipts, with any promise therein contained for payment of interest; and that if bankers do not pay on demand their notes, they, their heirs, executors, and administrators, shall thenceforth be chargeable with interest on the sums mentioned in such notes or receipts. The sixth section enacts, "that if any banker, after he shall have stopped payment, shall receive or discharge any sum of money due to him at the time of his stopping payment, every such receipt and discharge shall be absolutely void; and that all deeds and conveyances made by any banker of his real or personal estate, after the time he shall abscond, conceal himself from his creditors, or stop payment, though made for valuable consideration, shall be null and void to all intents and purposes whatever, unless made in trust for the creditors of the banker: and then the eighth section enacts, that from and immediately after the time that any banker shall abscond, conceal himself from his creditors, or stop payment, or die, all the real estates, whether for lives, in fee simple or fee tail, and all the personal estate, credits and effects whatsoever, either in law or equity, of which such banker shall be seised, possessed of, or entitled unto at the time of his death, or stopping payment, or absconding, or concealing himself from his creditors, shall be liable and subject to the payment of all and every his debts, of what nature or kind soever the same be, without any regard to priority or preference in point of payment, other than and except such debts and encumbrances as such banker shall contract before he became a banker, and except such debts and encumbrances as shall be secured by deeds or conveyances registered as aforesaid."

The Act then contains clauses enabling the banker to vest all his estates in trustees, for the benefit of his creditors; and the 40 Geo. 3, c. 22, comes in aid of these last-mentioned provisions, by providing that the banker making such an assignment shall be protected from personal liability and from arrest.

There were afterwards passed the 1 & 2 Geo. 4, c. 72, and the 5 Geo. 4, c. 73. These were expressly or impliedly repealed by the 6 Geo. 4, c. 42, intituled "An Act for the better Regulation of Copartnerships of certain Bankers in Ireland." The second section of that statute enacted, that it shall be lawful for any number of persons united in partnership, and not having any houses of business at any place less than fifty miles from Dublin, to carry on the trade and business of bankers in like manner as copartnerships of bankers, consisting of not more than six in number, may lawfully do; and to borrow or take up any sum of money on their bills or notes, payable on demand; "all the individuals composing such societies or copartnerships being liable and responsible for the due payment of all such bills and notes, in manner hereinafter provided." Section 3 empowers such societies to appoint agents; and section 4 restricts them from issuing notes or borrowing money in Dublin, or within fifty miles of it. The 5th section provides that nothing contained in that Act, or in any other Act or Acts, shall extend or be construed to prevent any person or persons whatever, whether resident in Great Britain or Ireland, from being or becoming a member or members of any such

* 145 * *Mr. Lawson* (of the Irish bar) and *Sir F. Kelly* for the appellants. — The 33 Geo. 2, c. 14, is applicable to this case ; if not, the creditors of joint stock banks in Ireland, to which the bankrupt law, 6 Wm. 4, c. 14, does not extend, will be

* 146 left * without any remedy. They may sue the public officer, and then issue execution against individual shareholders ; but these being eight thousand in number, the creditors would, in fact, be left without any means of obtaining satisfaction of their debts. The Statute of Geo. 2 secures them those means. The 29 Geo. 2, c. 16 (Ir.) is the first of the statutes relating to banks in Ireland which it is necessary to notice : that was called “ An Act for pro-

society or copartnership in Ireland, as aforesaid, or from being or becoming a subscriber and contributor, or subscribers and contributors, to the stock and capital of any such “ society or copartnership.” The sixth section provides for a registry at the stamp office, and for certificates of such registry being given to the society ; and the tenth section gives power to “ any such society or partnership,” to sue and be sued by its public officer ; the eleventh section enacts, that no person having any demand against the society, shall bring more than one action or suit in respect of such demand. Provision is then made (§ 12), for giving effect in Great Britain to judgments obtained in Ireland against the public officer, and (§ 13) *vice versâ* ; and the fourteenth section provides that decrees and orders of a Court of equity, against the public officer, shall have effect and operation against the individual members of the copartnership ; and it is provided (§ 16), that judgments and decrees against the public officer may be registered in Scotland, and have effect there : and by the seventeenth section it is enacted that all judgments in any action, suit or proceeding, in law or equity, against the public officer, shall have the like effect and operation upon and against the property of the society, and upon and against the property of every member thereof, as if such judgments had been recovered and obtained against such society itself ; and that the bankruptcy or insolvency of the public officer, in his individual character, shall not be the bankruptcy or insolvency of the society ; and, by the eighteenth section, execution upon any judgment obtained against the public officer may be issued against any member for the time being of the society ; and in case such execution shall be ineffectual, then the party obtaining the judgment may, upon motion in open Court made after notice, issue execution against any person who was a member of the society at the time when the contract or engagement on which the judgment was obtained was entered into ; but not beyond three years after any such person shall have ceased to be a member of such society or copartnership. Then, by the twenty-second section, power is given to the members to transfer their shares in the manner therein mentioned ; and the twenty-sixth section concludes this act of legislation, by declaring that nothing in the Act contained shall be construed to prevent any such society or copartnership from doing any act, matter, or thing which, but for the express provision of this Act, it would by law be entitled to do.

moting Public Credit " ; it required all persons to sign the notes issued by them as bankers, and it prevented merchants and others from carrying on any general business, if they carried on the business of bankers. Under that Act, therefore, the existence of joint stock banks was impossible ; and so the law remained till the 5 Geo. 4, c. 73, * which allowed banks of more than six * 147 persons in number, and which was, in the following session, repealed, in order that its provisions might be extended by the 6 Geo. 4, c. 42. Joint stock banks can now be established in Ireland ; but the provisions of the last-named statute are not sufficient for their complete regulation, and they therefore remain subject to the 33 Geo. 2, c. 14, by which, from the moment of the stoppage of a bank, the whole estate of each shareholder becomes in trust for the general body of the creditors. The petition here is to carry that trust into execution. The words, " accountable receipts," in that statute, show that it applies both to banks of deposit, and to banks issuing their own notes, and, consequently, to all persons whatever carrying on the business of a banker. It is submitted that the Tipperary Bank comes under that general description.

As to all such persons, the provisions of the statute are very stringent : all conveyances made, and receipts and discharges given by them, are void, in favour of creditors. Sections one, six, eight, and ten are particularly referred to. The 40 Geo. 3, c. 22, recognises and applies the provisions of the previous statute, and protects the persons of those bankers who had complied with them, while the 47 Geo. 3, c. 74, and the 11 Geo. 4 & 1 Wm. 4, c. 47, and the 8 & 9 Vict. c. 37, equally recognise its existence by repealing some of its provisions, and thus, impliedly, leaving the other provisions in full force. That is decisive of the question.

Joint stock banks, though not then established, fall within the meaning of the provisions of the 33 Geo. 2. That statute was meant to apply to all banks, and is equally applicable to them, whether their partners are few or many. The 1 & 2 Geo. 4, c. 72, § 6, first allowed " societies or partnerships," of any number of persons beyond fifty miles from Dublin, to issue notes ; then came the 5 Geo. 4, c. 73, * which repealed the 29 Geo. * 148 2 (Irish), and allowed joint stock banks in Dublin itself ; and it expressly regulated partnerships of more than six persons, " who shall carry on the trade or business of a banker or bankers " ;

these words bring joint stock banks within the operation of the general laws then existing in Ireland, as to banks and bankers; and the appointment of a public officer, who is to represent the bank in all actions and suits, does not alter the rights and liabilities of the parties, but only affects the forms of the proceedings. The 5 Geo. 4 was repealed, and, with other provisions, re-enacted by the 6 Geo. 4, c. 42, which now regulates banks and bankers in Ireland. That statute, and the 33 Geo. 2, c. 14, must be read together; in that way alone are their provisions complete for the purpose for which they were enacted. Thus, by the seventeenth section of the 6 Geo. 4, the bankruptcy of the public officer is not to be construed to be that of the society; but the statute does not make any provision for the society becoming insolvent; and why? because the 33 Geo. 2 had already provided for that event. The eighteenth section points out the only mode in which a judgment on an action can be enforced by execution, but that still treats the matter as being a demand by an individual creditor alone, and does not afford such a remedy as the 33 Geo. 2 affords, by an equitable trust for the general distribution of the funds of the society or partnership, and of its members. To make the creditors' remedy complete, the two statutes must therefore be put in force together. The Statute 6 Geo. 4 employs only affirmative words, giving certain remedies, but does not use any negative words to take away any existing remedies. It cannot therefore be contended that it repeals the 33 Geo. 2 by implication, and it certainly does not do so by express enactment, for it never mentions that statute.

A joint stock banking business is a trade within the
 *149 * meaning of the provisions of Acts prohibiting certain persons from carrying on trade, *Hall v. Franklin*,¹ where the 57 Geo. 3, c. 99, was held to apply to clergymen who were members of joint stock banks: *Ex parte Wyndham*,² Deacon's Bankrupt Laws.³ If so, then, unless the 33 Geo. 2, c. 14, is absolutely repealed by the 6 Geo. 4, c. 42 (and the later does not in the slightest manner refer to the earlier statute), the decree of the Court below dismissing the petition cannot be supported. This question has already been decided in Ireland. In *Fawcett v.*

¹ 3 M. & W. 259.

² 1 Mont., D. & De G. 146.

³ 1 Deacon's Law & Pr. of Bankruptcy, 2d ed. 23.

Hodges,¹ it was held that the 33 Geo. 2, c. 14, is not repealed by the 6 Geo. 4, c. 42. That decision is in conformity with prior authorities, and up to this time it has never been disputed. In *Hayden v. Carroll*,² it was held in the Irish House of Lords, that the Statute 33 Geo. 2, c. 14, extends to all the debts of a banker indiscriminately; and in the judgment there, delivered by Lord Clare, it was said, "There is no point more clear than that a subsequent affirmative statute may repeal a prior one if the words are contrariant, but it is equally clear that if there be two affirmative statutes made on the same subject, on all points on which they do not contradict each other, both shall stand"; and he goes on to say, "They form two distinct codes and certainly may stand together."

[THE LORD CHANCELLOR. — There is no doubt as to this general proposition. The difficulty is in reconciling the provisions of the two statutes with each other.]

That then brings the question back to the authority of *Fawcett v. Hodges*, where their various clauses were fully considered. It is admitted that in a statute of this kind, words which enact a remedy may confine the creditor to * the use of that remedy, * 150 *Steward v. Greaves*; ³ *Davison v. Farmer*; ⁴ but those cases, and *Dodgson v. Scott*,⁵ and *Ness v. Angas*,⁶ are cases in which these particular remedies were enforced by individuals in particular cases; when the whole body becomes insolvent, the creditors at large must seek their remedy according to the general law of the land. These particular remedies are unapplicable to the whole body of the creditors, for they are barred after a certain lapse of time, *Barker v. Buttress*,⁷ and *Heward v. Wheatley*,⁸ showing that proceedings cannot be had against former members, even within the time limited by the law, except after proceeding against present shareholders who are primarily liable. No other remedies, therefore, but those which were given by the 33 Geo. 2, c. 14, would now be effectual, the more especially as that is the only statute which enacts a general trust of the property of the copartners for the benefit of all the creditors. It may be that some of the provisions of the two statutes, 33 Geo. 2, and 6 Geo. 4, appear incon-

¹ 3 Irish Eq. 232.

² 3 Ridgw. Parl. Cas. 545.

³ 10 M. & W. 711.

⁴ 6 Exch. 242.

⁵ 2 Exch. 457.

⁶ 3 Exch. 805.

⁷ 7 Beav. 134.

⁸ 5 De G. & S. 552.

sistent with each other, but that is so with regard to the Winding up Acts and the Bankrupt Acts in this country, and yet no doubt has ever been entertained that they give coexistent remedies, and may be applied together. The Tipperary Bank was a "banker" within the true intent and meaning of the 33 Geo. 2, and the provisions of that statute must be applied in the settlement of its concerns.

The Attorney-General (Sir R. Bethell), Mr. Napier (of the Irish bar), and Mr. R. Palmer for the respondents. — The two statutes are wholly incompatible with each other, and the earlier * 151 must, therefore, be treated as repealed * by the later statute.

It is a settled rule, that with respect to all general statutes, they must be construed with reference to the state of the law when they were passed, *Dean of Ely v. Bliss*.¹ Applying that rule here, it is clear that the 33 Geo. 2, c. 14, is no longer in force. When that statute was passed the Legislature dealt only with common-law rights and liabilities, and with individuals joining in small co-partnerships and forming banks of issue; and as to these banks, there was, at that time, no bankrupt law applicable to them. The existence of such an artificial creation as that of a joint stock bank was not then foreseen. That is an important element in the consideration of this question. The eighth section of the 33 Geo. 2, c. 14, shows that individual partners were then alone thought of; for it speaks of the Act being put into full operation whenever he (the partner) should die. The literal application of that section to the concerns of joint stock banks would produce most outrageous results. Whenever one of the members of such a bank died, his estate must be wound up, and every shareholder being liable *in solido*, that could not be done without ascertaining all the liabilities of the bank, which would, in fact, be winding up the concerns of the bank on the death of each individual shareholder. Again, the object of the Legislature in the 5 and in the 6 Geo. 4 was to encourage the introduction of English capital into Ireland. But the 33 Geo. 2 prohibits any "banker" from indorsing in his own private business any note bearing interest, and this, according to the construction contended for on the other side, would apply to every shareholder in a joint stock bank, however great might be the amount of his own private business, and however small the amount

¹ 5 Beav. 574.

of * his shares. Again, if English merchants took part of * 152 their capital to a bank in Ireland, the whole of their business here might be stopped for two months while the unnecessary winding up of the joint stock bank concerns, occasioned by the death of an individual shareholder, was going on in Ireland. No Englishmen would join in an association where they were liable to such injurious contingencies. In that way, therefore, the continued existence of the 33 Geo. 2, c. 14, and its application to joint stock banks, would entirely defeat the intention of the Legislature as declared in the 6 Geo. 4. On the other hand, if the estates of the English shareholders were not to be thus affected, but were to be exempted from the operation of the 33 Geo. 2, the application of which was to be confined to residents in Ireland, then the Irish shareholders must bear the whole burden of the liability without their aid. The fifth section of the 6 Geo. 4 expressly abolished all the restrictions which "any Act or Acts" had imposed on any persons in England or Ireland becoming members of banking copartnerships; it must, therefore, be construed to have repealed the statutes which imposed them. The creditor of any bank created under the 6 Geo. 4, c. 42, is sufficiently protected by the remedy which is given him in sections 10 to 14 of that statute, by which he is enabled to proceed by an action or suit against the public officer of the company.

[LORD ST. LEONARDS. — The statute affords remedies in favour of individual creditors as against individual members; but where are provisions corresponding to those of 33 Geo. 2, c. 14, which insured the administration of the general funds?]

The bankrupt law is applicable to such a company, and, therefore, that administration of general funds is provided for. The 6 Wm. 4, c. 14 ("An Act to amend the Law * relating * 153 to Bankruptcy in Ireland") provides (§ 18), "that all bankers shall be deemed traders liable to become bankrupts." It may be contended that that only refers to individuals who trade as bankers, and that the proviso in the same section, that "no member of or subscriber to any incorporated commercial or trading company, established by charter, or under, or registered in pursuance of, any Act of Parliament, shall be deemed, as such, a trader liable by virtue of this Act to become bankrupt," prevents its application to joint stock banking companies; but the 8 & 9 Vict. c. 98, expressly subjects joint stock companies coming within

the descriptions contained in the 7 Wm. 4 and 1 Vict. c. 73, and the 7 & 8 Vict. c. 110, to the bankrupt laws, though the individual members are (§ 2) protected against being thereby declared bankrupts. The Tipperary Bank was in existence when 8 & 9 Vict. c. 98 passed, and must, therefore, be subject to its provisions, which render useless those of the 33 Geo. 2.

The cases of *Steward v. Greaves*,¹ and *Chapman v. Milvain*,² show that where a particular mode of enforcing a liability, different from that which previously existed at the common law, has been created by statute, it must be followed, and that it is not in the option of any individual to adopt one or the other. *Davison v. Farmer*,³ *Ness v. Angas*,⁴ *Barker v. Buttress*,⁵ *Steward v. Dunn*,⁶ and *Powles v. Page*,⁷ affirm the same principle, and show that a joint stock company is not, even as to notices, to be treated like an ordinary partnership. The Irish statute, which applied to ordinary partnerships, cannot, therefore, be applied to this joint stock bank, which in no way bears that character.

* 154 * *Fawcett v. Hodges*⁸ cannot, therefore, be supported; and when a similar matter was before Lord St. Leonards, in *Taylor v. Hughes*,⁹ no such effect was sought to be given to the 33 Geo. 2, c. 14, as had been erroneously attributed to it in the previous case.

Sir F. Kelly, in reply. — There is not in the 6 Geo 4, nor in any other statute, a repeal of that of the 33 Geo. 2, c. 14, but several statutes recognise its existence. The possible difficulties that may arise in applying its provisions to a new state of things, or that may ensue to individuals from the application of them, cannot be treated as impliedly repealing it. The case of *re Weiss*¹⁰ shows that the creation of an official manager does not put him in the place of the body corporate; that it does not affect the rights of parties interested, nor take away from them powers which they already possess, but merely affords a new and more convenient mode of enforcing both. The principle on which this case must be decided is that laid down in the *British Bank* case, *Aitchison v.*

¹ 10 M. & W. 711.

² 5 Exch. 61.

³ 6 Exch. 242.

⁴ 3 Exch. 805.

⁵ 7 Beav. 134.

⁶ 12 M. & W. 655.

⁷ 3 C. B. 16.

⁸ 3 Irish Eq. 232.

⁹ 2 Jones & L. 24.

¹⁰ 15 C. B. 331.

Lee,¹ and that principle is, that where at the time of passing an Act it is found that the creditors of a copartnership are entitled to various rights and remedies, such rights and remedies continue unless they are expressly taken away by the provisions of the new Act, or unless it is absolutely impossible to administer the old law in conformity with the new. No impossibility of that kind exists here.

July 9.

THE LORD CHANCELLOR. — The petitioners in this case rest their claim on the Irish Statute 33 Geo. 2, c. 14. They contend that the Tipperary * Bank was a "banker" within the true * 155 intent and meaning of the 8th section of that statute, that every shareholder in that bank was a banker, that when the bank stopped payment every shareholder stopped payment, and so that, according to the provisions of the 8th section, all the real and personal estate of the bank, and of all its shareholders, became liable to the payment of all the creditors of the bank.

The relief is sought on the ground, first, that the Statute of Geo. 2 is in force; and secondly, if in force, that it entitles the petitioners to the relief that they seek. The case was argued very ably, and the result has been a clear conviction on my mind that the Lord Chancellor of Ireland came to a correct conclusion, that the provisions of the Statute of Geo. 2 do not apply to a joint stock bank established under 6 Geo. 4, c. 42, and so that he properly dismissed the petition.

I concur with the opinion at which the Lord Chancellor arrived, that the holder of shares in a joint stock bank, established under the authority of 6 Geo. 4, c. 42, is not a banker within the meaning of the 33 Geo. 2, c. 14, § 8; and I come to this conclusion on the ground that the provisions of the latter-named statute are altogether inapplicable to the case of joint stock banks, and therefore, although it is true that the shareholders in such banks are sometimes designated in the later statute by the name of "bankers," yet that word cannot have been used in the sense in which it is used in the earlier statute.

The object of the 6 Geo. 4, c. 42, was to enable large numbers of persons to unite for the purpose of carrying on in partnership the business of banking, and the Legislature, contemplating the impossibility that would exist of enforcing legal rights, whether

¹ 26 Law J., N. S., Bk. 1, 3 Jurist, N. S. 95.

by or against a partnership of numbers so extensive as the
 *156 statute sanctioned and meant * to encourage, made many
 very special provisions with respect to such associations.

In the first place they are to provide a public officer, who in all suits, whether by or against them, is to be the representative of the whole body. Secondly, in case of a judgment against the public officer, the judgment creditor is to have execution against any person who is a member of the partnership at the time he issues execution, for that was the construction put on the corresponding clause of the English statute in the case of *Dodgson v. Scott*.¹ This it will be observed is a new right given to the creditor against persons, against whom in an ordinary partnership he would not, or might not have been entitled to any relief. This common-law right in the case of an ordinary partnership would have been a right against those who were partners when his debt arose, and they would not or might not be persons who were members when the execution issued. If the creditor is unable to obtain satisfaction by execution against the existing members, he is then, by the provisions of the 18th section, entitled to have execution against these or any of those who were members when his debt was contracted, but who have since ceased to be members. This is in effect a provision throwing him back on his common-law right, or rather giving him a right against those who would have been liable in an ordinary partnership. The statute, however, cuts down or qualifies the right by restricting it to a right against those who have not ceased to be shareholders for three years, for after that time their liability ceases. Another important difference between these joint stock banks and ordinary banking partnerships is, that in the former, shares may be transferred according
 *157 to the provisions of the Act and of the * deed regulating the partnership without the express sanction of the other shareholders, which certainly cannot be done in any partnership not constituted according to the statute. These provisions appear to me to be irreconcilable with the rights given to creditors of a bank by the 38 Geo. 2, c. 14.

I do not dispute the general proposition that an affirmative statute giving a new right does not of itself and of necessity destroy a previously existing right. But it has that effect if the apparent intention of the Legislature is that the two rights should not exist

¹ 2 Exch. 457.

together ; and that, I think, is the case here. The remedy given against the public officer is not in terms expressed to be a substitution for the common-law right of action ; but from the nature of the case, it was held in *Steward v. Greaves*¹ that this must have been what the Legislature intended. The evil to be guarded against was the inconvenience to which creditors would be put if they were driven to bring actions against parties so numerous as those of whom joint stock banks might and probably would consist. The remedy provided was the naming a person who, for the purposes of litigation, should represent the company, and the anomalies which would be produced, if this right were to coexist with the previous common-law right of action, were so great as to warrant the Courts in deciding that that right must have been intended to be taken away altogether. Does not precisely the same ground exist for holding that the statutory remedies given by 6 Geo. 4, c. 42, operate to supersede those given by 33 Geo. 2, c. 14, supposing them to have been then in force ? The Winding-up Act, it must be observed, did not pass till 1848, and must therefore be laid out of the question when we are construing the 6 Geo. 4, c. 42.

* The circumstance that a joint stock bank had stopped *158 payment does not prevent a creditor from suing the public officer. The creditor, therefore, has his statutory remedy under the Joint Stock Act, by means of such an action against the existing and former shareholders, just as if there had been no stoppage of payment. This right is at least as inconsistent with the right given by 33 Geo. 2, as with the common-law right of action against the shareholders collectively or individually. The decision in *Steward v. Greaves* proceeded on the ground that the statutory right could not, without very great inconvenience, coexist with the ordinary common-law right, and so must have been intended as a substitutional, not as an additional remedy ; and the same principle must apply in the case of the old statutory right given by the 33 Geo. 2, c. 14.

It is to be observed that the remedies given by that statute may be enforced not only when there is a stoppage of payment, but also when any banker, that is, according to the construction contended for, when any one of the shareholders, shall die. According to the argument of the appellants, there is then a right on the part

¹ 10 M. & W. 711.

of any creditor of a deceased shareholder to file a bill for the purpose of having the estate of that shareholder applied in payment of all his debts, including his liabilities to the creditors of the bank, such payment to be made rateably without any preference for specialty debts. This would involve the necessity of taking all the accounts of the company, however solvent it might be, in effect of winding up its concerns, whenever a shareholder should die, — a state of things obviously inconsistent with the continuous existence of a joint stock company. The right given by the statute is a right not confined to the creditors of the bank, or the creditors of the banker in respect of his business as a banker. It

extends to all creditors, however their debts may have
 * 159 * arisen. A very slight consideration of the provisions of the statute will show that this is a right not to be reconciled with the 6 Geo. 4, c. 42. In the first place, on the death of a shareholder, his liability to the creditors of the bank is, by the express provision of that statute, at an end, except that, as to debts contracted while he was a shareholder, his assets may perhaps be made liable in a secondary degree by way of security, if the creditor is unable to obtain satisfaction by means of executions against the existing members. This is inconsistent with the rights given by the Statute of Geo. 2, which assumes that the assets of the deceased banker remain liable to the debts due from the bank at the decease of the partner, just as he was himself liable in his lifetime.

But, in the next place, supposing the Statute of Geo. 2 to be in force, the liability of the assets of the deceased shareholder will be materially varied according to the time at which the creditor institutes his proceedings. If he files his bill within three years after the death of the shareholder, then all the debts of the deceased, as well those by simple contract as those due on specialties, will be paid *pari passu* ; but if he delays for three years, then the ordinary common-law precedence of specialty creditors will revive, for it can hardly be contended that the Statute of Geo. 2 was meant to interfere with the legal priorities of his personal creditors, when all his liability to the partnership creditors had come to an end, without any recourse to him or his estate.

It may further be observed, that the right given by the Statute of Geo. 2 is framed on the assumption that all the debts of a deceased banker, as well those due from him as a banker, as

also those due from him in his private character, could be included in one common demand, and so be made the subject of one suit. And this might well be * in the * 160 case of an ordinary partnership, but is impossible in the case of a deceased shareholder in a joint stock bank. For there is nothing in common between the creditors of the bank, and the creditors of the deceased individual shareholder. The right of the latter is against the personal representatives of their deceased debtor, in respect of the assets come to their hands. The right of the former is against the shareholders for the time being. They have no right against the executors of the deceased shareholder, except so far as they may, for a period of three years after his death, be able to establish a right by first asserting it, and asserting it ineffectually, against the surviving shareholders.

It is not unworthy of notice, that in order to apply the 8th section of the 83 Geo. 2, c. 14, to the case of a joint stock bank, we must read the word "banker" as it occurs in that clause in a twofold sense: first, as designating the aggregate body; and, secondly, as applying to every individual shareholder. It must be read as applying to the whole body, otherwise the words "immediately after the time that any banker shall stop payment" would not meet the case of the bank stopping payment, while its shareholders individually continue to meet the demands on them. It must also be read as applying to each individual member of the partnership, otherwise the provision in the case where any "banker" shall die would be inappropriate. The contingency of death must have reference to every member individually. The necessity of giving this double meaning to the word "banker" affords an additional argument to show that the clause where the word occurs could not have been meant to apply to a joint stock bank.

There is now no restriction as to the persons who may be shareholders. Any merchants or traders may be shareholders, and so in a certain sense "bankers," and if any * share- * 161 holder should in his private trade stop payment, the case will be brought within the express provision of the Statute of Geo. 2, and the result must be that all the affairs of the bank must be wound up.

There are many other anomalies, but I do not think it necessary to pursue the investigation. I have pointed out what I consider quite sufficient to show that the provisions of the Statute 33

Geo. 2 are incompatible with those of the subsequent Statute 6 Geo. 4, and I have therefore come to the conclusion, that the older statute does not apply to the case of joint stock banks. I must, however, add in conclusion, that even if that were not so, I should have held that the present petition could not be sustained, for it is a proceeding instituted not in behalf of all the creditors of the several bankers, but only on behalf of the creditors of the bank, and it would be a course unwarranted by the Statute of Geo. 2, to sustain a suit instituted with the express object of making the property of all the partners applicable to the discharge, not of all their debts, but of those exclusively to which they were liable in respect of the bank.

I am therefore of opinion, that the order appealed against was correct, and that this appeal ought to be dismissed, and I move your Lordships accordingly.

LORD BROUGHAM.—In this case in which during the earlier part of the argument I entertained some doubts, I have come entirely to the same conclusion with my noble and learned friend, and for the reasons which he has so clearly and satisfactorily stated. I think it is perfectly clear that the 8th section of the 33 Geo. 2, c. 14, does not apply to joint stock banks in Ireland. But of this I have no doubt, that the Statute 6 Geo. 4, c. 42, makes an end of all questions whatever upon this subject. I entirely *162 go along with Lord Clare in *the case of *Hayden v. Carroll*,¹ when he says that if there be two affirmative statutes, and “the provisions in the subsequent affirmative statute are not contrariant,” as he terms it, to those of the prior affirmative statute, those provisions in the prior statute not so contradicted by the subsequent statute must stand. But it is equally clear that, without the provisions of the subsequent statute being in direct positive contradiction, or as he would call it, “contrariant” to the prior statute, they may be so entirely inconsistent and incompatible with its provisions that they will operate just as entirely against the subsistence of that prior statute as if they had been what his lordship calls contrariant. After the distinct statement of the grounds of opinion which my noble and learned friend has given, I need not go further into the case or inquire whether, according to the argument for the respondents at the bar, the Irish

¹ 3 Ridgw. Parl. Cas. 545.

Winding-up Act (8 & 9 Vict. c. 98), being also incompatible with 33 Geo. 2, c. 14, may be held to operate to the repeal of that statute. It is unnecessary to go into that question. Enough has been said respecting the inconsistency of the two Acts 6 Geo. 4, c. 42, and 33 Geo. 2, c. 14, even if we held (which we do not) that the earlier Statute of Geo. 2 applies to joint stock banks; I am, therefore, clearly of opinion with my noble and learned friend, that your Lordships should affirm this decision and dismiss the present appeal.

I ought to state in justice to the learned gentlemen, who argued this case at the bar, that I entirely agree with my noble and learned friend, that the case has been most ably argued, and when I said that at first I entertained some doubt, it really was in consequence of the force and effect of the argument of the learned counsel who first addressed us for the appellants.

* LORD ST. LEONARDS. — My Lords, this case has been *163 most elaborately and exceedingly well argued at the bar on both sides, and the question turns upon the construction of the Acts of Parliament which have been referred to, and materially upon the absence from the law of Ireland of any enactment which could provide for the creditors of this bank, in case the Statute of the 33 Geo. 2 does not apply to them.

Now, in order to see how the law of Ireland really stands, I think it necessary to call your Lordships' attention very shortly to the several Acts of Parliament which have been passed in relation to banking in Ireland. The first statute was the 8 Geo. 1, c. 14; the great object of which was to make real estate liable for the payment of debts incurred by bankers. It required, amongst other things, that deeds should be enrolled very quickly, whatever might have been the consideration for which they were made. And it gave a summary remedy against bankers who should either abscond or conceal themselves. But there is not a word about stopping payment; and upon the banker's death all his real estate is made general assets for the payment of all his debts.

My Lords, that went on for a considerable period, and then, as we learn from Lord Clare's statement, in the Irish House of Lords, a considerable panic was created by certain gentlemen who had formed banking companies in Ireland, and had issued their notes at a small rate of interest, and, receiving large deposits upon those

terms, had then lent out the money upon securities at a larger interest. At last, as will happen to such companies, the persons who had advanced the money to the bankers required repayment rather more quickly than the bankers could obtain repayment of the loans made by them. There is an Act of Parliament * 164 amongst the Irish statutes providing * for the payment of the creditors of one of these banks, the bank which had created the mischief, and that led to more stringent measures as against bankers in Ireland.

The Act 29 Geo. 2, c. 16, which was called "An Act for the promoting of Public Credit," imposed two restrictions upon all bankers in Ireland. One of these restrictions was, that no banker was to be a trader or a merchant; the other restriction, that every partner in a bank was to sign every note or bill which that bank issued. Those restrictions necessarily and unavoidably prevented any thing like a large banking partnership, and confined the banking business, of course, to a very few in number, and that wholly regardless of what afterwards took place, in order to secure the Bank of Ireland, as the Bank of England was secured; but those impediments being thrown in the way of banking, there could not be under the law as it stood, from the necessity of the case, any great number of persons acting as bankers.

That went on till the Statute 33 Geo. 2, c. 14, which has been referred to, and by that Act of Parliament an entirely new state of things was created. Every deed which a man executed, being a banker, unless it was enrolled within a short time, although for valuable consideration, with perfect good faith, was rendered void. In point of fact a banker by that Act of Parliament, from the moment that he became a banker, lost the control over his whole property; and the whole of his assets may be said to have been dedicated to the payment of all his debts, not simply of the bank debts, but of all his debts. Any conveyances to children or to grandchildren, although for valuable consideration, were made void absolutely by that statute. Lord Clare said in the Irish

House of Lords that he did not see that that statute would * 165 apply to a marriage settlement. I believe it * would be quite impossible to maintain that opinion. It is not material to enter into it, but the Act of Parliament struck at all conveyances, although for actual value or to children or grandchildren. Then it prevented bankers from issuing notes with interest.

That was levelled directly at the private banks, to which I have already referred ; and by a very material clause, after stoppage of payment, it rendered void any receipt or discharge by a banker of any sum whatever, so that it paralyzed him from the moment of his stopping payment. It is to be borne in mind that there is not a single word in that Act of Parliament that applies to any thing like a joint stock bank, a thing that had not been created at that time. Nor is there a word applying to joint partners, but every portion of that Act of Parliament looks to the individual, both under the section which I am now about to state, and under the other parts of the Act.

The section 8, to which my noble and learned friend on the Woolsack has already referred, enacts that from the time of any one of certain events, namely, absconding, concealing himself, or stopping payment for the first time (which last is not an act of bankruptcy in either country, although the others are), or death (some of these would be acts of his own, this last would, of course, be an act of God), from the time of any one of those acts of the individual banker, all his real and personal estate is at once made liable for the payment of all his debts. The 10th section is directly in opposition to every thing which has since passed, for the 10th section provides that if within three months after the happening of any of these events in the banker's lifetime, he shall vest all his real and personal estate in trustees of his own nomination, with the approbation of a certain number of his creditors, and with the approbation of the Court, that shall be valid. And there was a limited provision in the case of stopping payment, * which saved harmless the banker from his debts * 166 after he had stopped payment.

That Act of Parliament contained another impediment in the way of banking, in addition to those of the 29 Geo. 2, c. 16, which was, that no person being in office and receiving public money should be enabled to trade as a banker. And I may mention that in all these Acts of Parliament a banker is treated as a trader. The trade or business of a banker is spoken of familiarly throughout every one of them.

In this state of things the Act 11 & 12 Geo. 3 passed the Irish Legislature. By that Act a general bankrupt law was provided for Ireland, and bankers were *eo nomine* made liable to the bankrupt law. It has been said that that was introduced into the Act by an

inadvertence, but it is clear that there is no foundation for that assertion, because not only are the words express throughout the Act of Parliament, but there is this provision, that no farmer, drover, or certain other persons, shall be liable or entitled to be a bankrupt under the Act, unless (among other trades) he shall be a banker. And, therefore, it is perfectly clear that the Act carefully included bankers. The Act of Parliament states what shall be acts of bankruptcy, and amongst them are two, which were provided for by the 33 Geo. 2, namely, absconding and concealing himself, or as the words are "keeping house," but not a word is said about stopping payment; that, therefore, was left as it stood upon the 33 Geo. 2. Every provision of the 11 & 12 Geo. 3 is, in my opinion, in direct conflict with the Act 33 Geo. 2. By the 33 Geo. 2, when any of the events took place which are there mentioned, all the real and personal estate of the individual banker became liable instantly to all his debts of every description, and

many things were made void which would not be avoided *167 under any general *law. Now the Act 11 & 12 Geo. 3,

which made bankers generally subject to that law, first of all vested all the estate, real and personal, of bankers on becoming bankrupts in assignees. It next provided for the safety of purchasers for valuable consideration within a certain limit; it then provided for the safety of settlements upon children for valuable consideration; it then provided that all the future real and personal estate of the bankrupt should be liable to the payment of his debts; it provided him with certain allowances, and it also provided a certificate for him which should discharge him from his debts; and lastly, with respect to payments to creditors who had not notice of the bankruptcy or the insolvency, it made them no longer liable to refund that which they had received.

It is impossible, therefore, to read that Act of Parliament without seeing that every single provision of it is in direct conflict with the Statute 33 Geo. 2, except so far as that statute provides for the stopping of payment, which is not expressly provided for by the General Bankrupt Act. But there are very few acts of bankruptcy which a man can commit, which in point of fact do not involve stopping of payment, for most of them are in point of fact simultaneous with stopping payment. If a bankrupt conceals himself up stairs, you may rely upon it that the door down stairs is not open for the payment of the banker's debts.

In this state of the law the question, in some sense, came before the Irish House of Lords, in the case of *Hayden v. Carroll*.¹ That was a case of no difficulty. It was the case of a partnership of two. There were plenty of assets, both joint and separate, to pay all the bank debts. The bank stopped payment, and the two partners executed a deed, conveying their property, real and personal, to *trustees, under 33 Geo. 2, c. 14, § 10; and *168 then a question arose which was raised, not by a creditor (no creditor, jointly or severally, impeached what had been done), but by one of the parties who was solvent, and his family claiming under him, against the other partner, who was insolvent, insisting that all the separate estate, as well as the joint estate, must go to pay the joint debts before any separate debts could be paid. That is to say, the solvent partner desired to have the benefit of the insolvent partner's separate estate, to pay the joint debts of the bank at the expense of the separate creditors of that insolvent party. It was held by Lord Clare, and afterwards by the Irish House of Lords, that that was not the true construction of 33 Geo. 2; not that they found any such thing in that Act, but as it had, in point of fact, been modelled upon the English bankrupt law, they inquired in what manner the assets had been distributed under that law; and finding that the English law, with respect to the distribution of the assets, gave first the joint assets to the joint creditors, then the separate estate or assets to the separate creditors of each, and then the surplus to the joint creditors, they adopted that plan. As the parties had executed a deed, and the creditors claimed under it, and nobody found fault with it, and it was only a question of distribution, this did not properly raise any question that the Irish House of Lords had to decide; but Lord Clare delivered his opinion that the 33 Geo. 2 would stand well with the 11 & 12 Geo. 3; and he said that he thought that assignees under the latter Act would be trustees under the Act of Geo. 2. I confess I cannot see how it is possible to maintain that opinion, for the Acts are in direct conflict with each other. If a man was made a bankrupt, under the common Bankrupt Act, it would be impossible, in my humble judgment, to say that he could be at all bound by the provisions * of the 33 Geo. *169 2. Lord Clare admitted that a prior act of bankruptcy, stopping payment, would take the case out of the Statute of Geo.

¹ 3 Ridgw. Parl. Cas. 545.

2; but a creditor of one of the two partners, having applied for a commission after this deed had been executed, that is, after the stopping of payment, he refused the commission, upon this ground, as he said, that the Act of 33 Geo. 2, by taking from the individual all his property, had rendered him no longer a trader, and therefore he was no longer subject to bankruptcy. However, that case really decided nothing, as regards the real operation of the Act 33 Geo. 2, although it is material to bear it in mind, in order to understand what really is the state of the law in Ireland with regard to banking.

After this case, and just before the Union, the Irish Legislature passed two Acts, in the 40th of Geo. 3. One provided a remedy for uncertificated bankrupts; and the next Act provided a remedy for bankers, under the 33 Geo. 2. And referring to the limited provision in that Act for the security of bankers who had stopped payment, but who had denuded themselves of all their property, it provided a certificate to be given by the trustees, but checked by the Court of Chancery, to whom the property should be conveyed. It only provided for cases in which there was a stoppage of payment, followed by a deed, according to the tenth section.

It would be impossible to deny, after that Act of Parliament, that the 33 Geo. 2 was, as far as regards stopping payment, undoubtedly considered, to some extent, an operative statute, because the 40 Geo. 3 deals with it as a statute then existing, and applying to the stoppage of payment. But up to that time, your Lordships will observe that we are dealing with individual bankers, who are made the subject of the bankrupt law; and whether
 * 170 that law was * or was not in conflict with the 33 Geo. 2, up to that time all the statutes dealt with individual bankers alone.

The time at last arrived when men were desirous of joining in considerable numbers for the establishment of joint stock banks, and by the 5 Geo. 4, c. 73, provision was made for the establishment of such companies. That Act began with repealing the Act of 29 Geo. 2, c. 16, and therefore it removed those impediments which up to that time had stood in the way of banking companies in Ireland; so that after that Act it was no longer necessary that every partner in a banking concern should sign every bill or note, and persons might enter into the trade of banking who otherwise could not have done so. That Act of Parliament was a compara-

tively short one, but it did not interfere with the 11 & 12 Geo. 3. I need not further comment on it, because in the next year the 6 Geo. 4, c. 42, was passed, which has been already so much observed upon. That statute repealed the former Act, and then gave further facilities for the establishment of joint stock banks. It was in itself, in fact, an entirely new code of laws, which applied strictly and properly to a new state of things. The old statute had been dealing with individual bankers, the new statute was dealing with a very different set of persons; it did not, like the 33 Geo. 2, deal with companies consisting of only six persons or less, it only dealt with companies where there were seven persons or more. I do not now enter into any discussion about the privileges of the Bank of Ireland, for they are not material to this question; the new statute dealing, as I have said, with companies consisting of large numbers, it provided remedies which are in themselves very proper and very effectual as far as they go, for there was already a general bankrupt Act striking at all bankers who committed common acts of bankruptcy, and then * came this Act applying * 171 to joint stock banks which required registry, and it imposed the condition that every member of the partnership should be upon the register, and likewise many other conditions, and gave to these new banks many privileges and benefits.

Amongst other things, as we have just seen, there was the important matter of a public officer; the banks were no longer to be impeded, nor their creditors to be impeded by what would have been a difficulty that could not have been surmounted without an Act of Parliament, namely, the difficulty of bringing actions or filing bills against, or by such a number of persons, and therefore a public officer was required to be appointed by every joint stock company, and every such company was to sue and be sued by that public officer. Then the remedy is this, that when the public officer has had a judgment recovered against him execution may issue upon that judgment against the individual partners; and that again is subject to limits, because execution cannot issue except by leave of the Court where the judgment is entered up, nor after the individual has ceased to be a partner for three years; and there is also a limited right given to every partner to transfer his shares. Now all these things are directly opposed to the Act of 33 Geo. 2. Where is the validity under this Act of any transfer by a bankrupt banker to trustees? Where is the power

to take all his real and personal estate? It is a mere absurdity upon the face of it, because as the Act of 6 Geo. 4, c. 42, does actually make every individual shareholder liable to execution upon a judgment against the public officer, only observe what the effect would be if you were to apply the 33 Geo. 2 to him; you would render him liable to an execution for the debt at the same time that you are taking from him every portion of his estate, *172 real and personal; so that * having stripped him of all his property, you leave him exposed to judgments to be executed against him.

The two Acts of Parliament are so thoroughly inconsistent with each other, and my noble and learned friend has so ably contrasted the one with the other, that I am relieved from considerable difficulty in that respect; but the more I consider them, the more I am satisfied that they cannot stand together as relates to the general administration in such cases. I am therefore clearly of opinion that the Statute 6 Geo. 4, c. 42, creates a new code of laws applicable to a new state of circumstances, not at all provided for by the Statute 33 Geo. 2, c. 14, which did properly apply to companies as they then existed, and which may still apply now to companies consisting of a less number than six; but we must bear in mind that we are speaking now only of joint stock banks, and not of companies consisting of less than six persons.

It is very material now to consider what has followed upon these Acts, and what remedies creditors in Ireland have under the bankruptcy of bankers. It was very fairly admitted in the opening that if the 6 Geo. 4, c. 42, provided a remedy for the creditors, the appellants had nothing to say; and of course the same admission must be made if any other Act of Parliament provides an effectual remedy. Now the 6 Wm. 4, c. 14, repealed the 11 & 12 Geo. 3, and made new provisions in regard to bankrupts in Ireland. It still included bankers as persons who might be made bankrupts in Ireland, and it provided for two of those acts which the 33 Geo. 2 had provided for, namely, absconding and concealing themselves, that is, "keeping house," but not for stopping payment; and that Act of Parliament (6 Wm. 4, c. 14) had a proviso (§ 18) which has been very much observed upon at the bar, "That no *173 member of any corporate or commercial or trading * company established by charter, which should be enrolled, or under or in pursuance of any Act of Parliament, should, in

regard to the trading of the company, be a trader," liable to the Bankrupt Act. That was said to exempt altogether bankers from the bankrupt law. But it does no such thing. Bankers are expressly made subject to the bankrupt law, but every individual shareholder, simply as a shareholder, in this Tipperary Bank, for example, could not be made a bankrupt. He must be made a bankrupt, if at all, upon his own act. He could not be made a bankrupt upon the trading of the company. That was expressly provided for, and very properly provided for; for the great object of the 6 Geo. 4, for example, was to encourage the further introduction of British capital into Ireland in joint stock banks; and it would be perfectly monstrous to hold that that Act could apply to every individual shareholder. Observe what the effect of it would be. There is one section particularly of that Act (§ 5), which provides (unnecessarily one would suppose) for any person in Great Britain becoming a shareholder in a bank in Ireland. But observe what would happen. Every individual shareholder would have every one of his deeds rendered void. If he had sold a single acre of land for valuable consideration, he would have had that deed rendered void, and so would the unhappy purchaser, unless it had been enrolled within a month of the execution of the deed; and all settlements made by him upon the marriage of his children would be void; and all his real and personal estate when he dies must be wound up; in fact, the partnership would have to stop (for there would be no other way of ascertaining what the liabilities were) while accounts were being taken of the man's assets. That provision, therefore, of the Statute of the 6 Wm. 4 did nothing more than this, it provided expressly for bankers *being made bankrupts, but saved the *174 individual shareholders in a concern like this from being made bankrupt by the failure of the copartnership. Your Lordships will bear in mind that this Tipperary Joint Stock Bank was created, in fact, under the powers of the Act of the 6 Geo. 4, c. 42, and the company traded under that Act to which it owed its existence.

Upon this part of the case I will only refer to an Act which was very much referred to in the argument, namely, 8 & 9 Vict. c. 37, and which was said really to be decisive of this question. I cannot concur in that view, I have read the Act of Parliament with great attention; it removed one impediment which was created by the

33 Geo. 2, those of 29 Geo. 2 having been already removed. It removed that remaining impediment, and therefore so far showed that it treated the 33 Geo. 2 to some purposes as a subsisting Act; but then I beg your Lordships' attention to this. The 33 Geo. 2 had two sets of measures, one remedial and the other restrictive. The restrictive measures remained of course, because when, for example, it was said that no banker should trade as a merchant, it required an express Act of Parliament to repeal that; so as to every banker signing every bill or note, it required an express Act to repeal that; so as to every man being in an office, and having the care of public monies, not being able to be a banker, it required an express repeal; and therefore the repeal of that restriction by the 8 & 9 Vict. c. 37, was only for the purpose of removing an impediment in the way of banking companies in Ireland; and there is not a word, in my humble apprehension, that can possibly bear against the argument to which I am addressing myself at present, in favour of the appellants.

My Lords, thus the Acts of Parliament stand as regards * 175 Irish banks in general. We now come to a very different * set of Acts of Parliament, which bear very much upon this case, but which require distinct consideration, and they are the Acts for regulating both joint stock banks and joint stock companies generally, and their winding up in England, and Ireland, and in Scotland. Three Acts were passed by the Legislature of this country in the 7 & 8 Vict., and they are c. 110, c. 111, and unluckily c. 113, and I hope my noble and learned friend, when he comes to consolidate the statutes, will take care that Acts relating to the same matter shall follow each other, and not be interrupted by another Act of Parliament being interleaved between them; the third Act was c. 113, instead of being, which would have been much more convenient, c. 112; they were all passed and received the royal assent at the same time.

The first of those Acts, c. 110, was for regulating joint stock companies in both England and Ireland, and it expressly excepted banking companies, of course because banking companies in Ireland had been provided for by the 6 Geo. 4, and banking companies in England were intended to be provided for by the next chapter but one, c. 113, which was passed at the same time.

Chapter 111 was a Winding-up Act, which for the first time provided expressly for the bankruptcy of joint stock companies, and

made certain acts acts of bankruptcy, and gave a very easy and effective remedy against every member of a joint stock company. Whether that Act extended to Ireland or not I shall not detain your Lordships by considering ; I think it does not matter, although I am inclined to think that it might have been held to extend to Ireland.

Chapter 118 was confined to England ; it provided regulations for joint stock banks in England, and there was a proviso singularly enough at the end of the Act * (§ 48), which led * 176 to a great deal of discussion at the bar, to this effect, that every company of more than six persons, trading as a joint stock banking company, in fact should be held to be a trading company within the meaning of chapter 111. Whether that was necessary or not, I do not know that it is material to consider, but I am inclined to think that it was not necessary ; but at all events it was introduced, and it is very singular to find it in chapter 118, for its proper place of course would have been chapter 111, which did provide for what trading companies should be liable to bankruptcy ; it was at the same time a declaration and an enactment.

Then after these Acts came the 8 & 9 Vict. c. 98, relating to Ireland ; that Act followed the model of the 7 & 8 Vict. c. 111, in England, and provided a very easy mode of making joint stock companies in Ireland bankrupts, and that Act of Parliament, if it included banking companies in Ireland, would at once have met the objection of the appellants, that they have not in Ireland a remedy equal to the English law in the case of the bankruptcy of a banking copartnership. Now, in my apprehension, this Act does in point of fact provide that remedy. It extends to various companies, and amongst others it extends to a company of this sort. It extends to any company or body of persons associated for commercial or trading purposes, to which powers or privileges have been or shall be granted by the Act 7 Wm. 4, & 1 Vict. c. 73, or by any other Act of Parliament. Now remember, my Lords, that throughout all the Acts of Parliament which I have been quoting to your Lordships, in every one of them, the occupation of a banker has been treated as a trade or business, and that trade or business has been made expressly subject to the bankrupt laws. Now I desire to know what there is to exclude from the operation of this Act, * 8 & 9 Vict. c. 98, a joint stock bank- * 177 ing company. Is it not a company or a body of persons as-

sociated for commercial or trading purposes, and to which powers have been granted by an Act of Parliament, namely, by the 6 Geo. 4? Is it possible, therefore, to contend that it is not a company falling within the express provisions of this Act of Victoria? The language might have been more simple, but I do not think language could have been more direct to the purpose to include amongst that general description this particular species of joint stock companies. And when we recollect that the great object of the Legislature, as is manifested by this statute, has been, as it ought to be, to put the law in both countries as nearly as possible upon the same footing, we cannot hesitate to come to the conclusion, and I advise your Lordships to come to that conclusion as far as it is necessary for deciding this case, that joint stock banks do fall within the express provisions of the 8 & 9 Vict. c. 98.

There was an Act of Parliament afterwards passed, 9 & 10 Vict. c. 75, which was referred to in the argument, and which contains within itself a sort of puzzle that I am not at all surprised has led to considerable difficulty; but I believe that, properly considered, it is open to no difficulty. The object of that Act was expressly to extend the 7 & 8 Vict. c. 113, to both Scotland and Ireland. Your Lordships will recollect that that was the Winding-up Act for England; at all events it made certain matters acts of bankruptcy, of which a creditor might very easily take advantage. The 9 & 10 Vict. c. 75, enacted this, that the Act to which I have referred should operate in Scotland and in Ireland just as if the whole Act was there re-enacted, substituting the words "United Kingdom of Great Britain and Ireland" wherever you find the single word "England." That would have led to no diffi-

*178 culty, * but then came a proviso which did create some difficulty. Your Lordships will recollect that the 7 & 8 Vict. c. 113, had a proviso that any joint stock trading company of more than six should be held to be a trading company within chapter 111, the Winding-up Act. Then the 9 & 10 Vict. c. 75, had this provision, that the proviso contained in chapter 113, stating what companies should be trading companies within chapter 111, should not extend to this Act, that is, it did not extend the declaration in 7 & 8 Vict. c. 113, to the 9 & 10 Vict. c. 75, though that had extended chapter 113 to both Scotland and Ireland. By the Act to which I am now referring the rights of creditors in Scotland are

entirely saved, and we have already seen that Ireland had itself a Winding-up Act, namely, the 8 & 9 Vict. c. 98.

Now I must ask your Lordships to follow me rather closely, while I proceed to show how it is that that proviso in the 9 & 10 Vict. c. 75, does not affect the question which is now before us. Your Lordships will observe that that statute says that the provision of the 7 & 8 Vict. c. 113, as to what shall be trading companies, within c. 111 of the 7 & 8 Vict. shall not extend to this Act. Of course that was quite right, as you will see, because as the 9 & 10 Vict. c. 75, enacted that the 7 & 8 Vict. c. 113, should be read as if the words "United Kingdom of Great Britain and Ireland" were found wherever you only actually find "England," if it had not been for this proviso, see what would have followed: you would have had to read the proviso in c. 113, referring to c. 111, in this way: Provided that every joint stock company of more than six persons, trading in the United Kingdom, shall be held to be traders within the 7 & 8 Vict. c. 111; that is, you would have made c. 111 apply both to Scotland and to Ireland. There was no intention of doing any such thing. Scotland had *its own *179 law; Ireland had its own law; and therefore, although it is a singular mode of expressing what was meant, and I am not surprised that it created some difficulty, yet I think that it throws no impediment whatever in the way of the clear construction of the Act. It leaves all the observations which I have ventured to make to your Lordships untouched. It is a proper proviso; but it in no respect exempts joint stock bankers from the operation of the law of bankruptcy.

There are two other Acts of Parliament only to which I must shortly refer, and they are of a different nature; they have not been commented upon at the bar, although they are the two very Acts of Parliament upon which these proceedings have been instituted; they are the 11 & 12 Vict. c. 45, and the 12 & 13 Vict. c. 108. Those Acts of Parliament have a different object; they enable a shareholder and contributor to come in and wind up all companies whereof the partners are not less than seven; all the joint property is at once vested in the official manager of the joint stock bank; but the separate property is to be pursued by process of execution, subject to certain guards. But there is this singularity in the first of these Acts of Parliament: the framer of it had not gone through all the Acts with the labor that was necessary, and I

am not at all surprised at it. I am sure we ought to make great allowances for the framers of Acts of Parliament in these days ; nothing is so easy as to pull them to pieces, nothing is so difficult as to construct them properly, as the law now stands. The first of these Acts of Parliament contains a very singular provision ; it recites both the English Act and the Irish Act, the Winding-up Acts ; and it says whoever is within either of those Acts shall be within this Act, which is given for contribution (and that would make it all right, supposing the Irish Act as well as the

* 180 English Act extends, as I have * stated to your Lordships I conceive it does extend, to joint stock banks) ; then it provides that it shall also extend to all joint stock bankers to whom it would have extended but for the exception which is contained in the 7 & 8 Vict. c. 110. It says that this new Act of Parliament, which is given for contributors, although it is, of course, to operate also for the creditors, shall not only extend to those persons who are within either the English Winding-up Act or the Irish Winding-up Act, but shall also extend to bankers who would have been within those Acts but for the exception contained in 7 & 8 Vict. c. 110. Now that puzzled me a little at first, but it is a simple mistake in the framing of the statute. The 7 & 8 Vict. c. 110, provides for joint stock companies, but expressly excepts banking companies, because banking companies were intended to be provided for by another statute which passed in the same year, namely, c. 113. When, therefore, this Act 11 & 12 Vict. c. 45, says that it shall extend to bankers, which it supposes to be excepted out of c. 111 of the 7 & 8 Vict., and out of the 8 & 9 Vict. c. 98 (which is an Act relating to Ireland), and supposes them to be excepted out of those Acts by the force of the exception in 7 & 8 Vict. c. 110, of course it is a simple mistake, because the 7 & 8 Vict. c. 110, did not deal with either c. 111 or c. 113, nor, of course, with the subsequent statute for Ireland.

In conclusion, therefore, my Lords, I entirely agree with my noble and learned friends. I thought it due to the great importance of the subject, and to the elaborate manner in which the case was argued, to consider the case with great attention ; and I have as clear and as strong an impression as a man can entertain, that the decision of the Lord Chancellor of Ireland was right ; and

I also think that the law of Ireland stands upon a very

* 181 good foundation ; * that the Winding-up Act does extend

to joint stock bankers, and that the laws of Ireland and England stand as nearly upon the same ground as it is possible they should do. At the same time, in a different capacity, and upon a different occasion, I shall be happy to concur with anybody who has the same object, in endeavoring to introduce a measure with a view to prevent all possible doubt upon this subject in future. I think all possible doubts upon the Act of 33 Geo. 2 ought to be put at rest ; and that no doubt ought to be entertained for the future that the 8 & 9 Vict. does include joint stock banks. But that should be done, of course, without prejudice to any litigation now existing. The duty which I now have to perform is to state that I entirely agree with my noble and learned friend in the motion which he has made. But although, in this House, it is the general rule, and I think a very proper rule, that costs should follow the decision, yet, seeing the difficulties which the Legislature has itself improvidently introduced into this question, I think it would be a great hardship to impose upon the appellants the costs of this appeal ; and I therefore think that the affirmance of the decree of the Lord Chancellor of Ireland should be without payment of costs.

LORD WENSLEYDALE. — The result of the appeal against the decision of the Lord Chancellor of Ireland in this important case depends, I think, upon the question whether the 33 Geo. 2, c. 14, is capable of being enforced against joint stock companies, established under the 6 Geo. 4, c. 42. I think after much consideration, and some doubt in the course of the argument, that it cannot be enforced, and therefore I advise your Lordships to affirm the decree of the Lord Chancellor of Ireland.

* The Statute of Geo. 2 is certainly not repealed, but is, I *182 conceive, in force as to bankers, however numerous they may be, carrying on that business in partnership, without a charter and without forming a joint stock company. It is not expressly repealed, and the Statute of 47 Geo. 3, c. 74, § 2, and 11 Geo. 4, and 1 Wm. 4, c. 47, § 13, recognise it by providing that it shall be unaffected by those Acts ; and it is also recognised by the 8 & 9 Vict. c. 37, which repeals one part of it, but leaves the rest unaltered. It continues therefore in force for some purposes. But the question for your Lordships to decide seems to me to be, whether it can possibly be applied to joint stock banks, formed under 6

Geo. 4, c. 42, or whether it is not with respect to them impliedly repealed.

If the Tipperary Bank had been incorporated by charter, the members of that corporation certainly would not have been bankers in any sense; and, therefore, not within the meaning of the 33 Geo. 2, c. 14. The company would have been a bank, but the individuals composing the company would not have been bankers, for the members of a corporation are by law different persons from the corporation itself. By only being partners in a joint stock company, they did not lose their individual character; they were still bankers in some sense, and in that character liable as such to the laws relating to bankers, if from their nature those laws could be enforced against them. If not, they may be said not to be bankers in the sense required by the Statute of the 33 Geo. 2, c. 14. That statute contains stringent and apparently very harsh provisions with regard to individuals carrying on business as bankers. They are somewhat difficult of application to bankers, even though few in number; but if the number is increased, the application of those enactments becomes more difficult and embar-

* 183 rassing, as is forcibly pointed out in the judgment * of the Lord Chancellor of Ireland. This consideration, however, cannot alter the law, and the statute must, notwithstanding the inconveniences which unquestionably belong to it, be carried into effect. And these inconveniences form no legal objection to the application of the statute, for they belong to its provisions in all cases, and if this statute did nothing more than somewhat increase those inconveniences, and present them in a more startling point of view, I do not conceive that that would be a sufficient reason for holding that the Legislature meant that the Statute 33 Geo. 2, should not apply to this case, and therefore impliedly repealed it.

But then comes the material question, are the provisions of that statute capable of being carried into effect at all against joint stock companies? It is now perfectly settled that all individual liability to action or suit of the members of a joint stock company, both at law and in equity, is put an end to by the 7 Geo. 4, c. 46. This was decided by the case of *Steward v. Greaves*,¹ confirmed by *Chapman v. Milvain*,² and *Davison v. Farmer*,³ which cases I believe have

¹ 10 M. & W. 711.

² 6 Exch. 242.

³ 5 Exch. 61.

been generally acquiesced in. This point must therefore be considered as perfectly settled. The direction that they may sue and be sued by the public officer is not permissive, but, as explained by the context, obligatory, and all suits at law or in equity for debts due from the company must be by the creditors of the company against the public officer.

The 33 Geo. 2, c. 14, being enacted for the benefit of all the creditors of bankers, whether in their banking business or not, the appellants cannot claim, under that Act, for their benefit, any of the estates and effects of the partners * to the exclu- * 184 sion of the creditors on other accounts; consequently they ought to make all those creditors parties to the suit, or some of them on behalf of others, if they are so numerous as not to be conveniently joined. The suit, therefore, is at all events defective in its present state. However, if the objection was merely that there were not proper parties as plaintiffs, the defect might have been remedied by amendment, and the suit not dismissed altogether. But if this amendment had been made, how could the appellants, consisting of the creditors of the joint stock banking company as such, and the creditors of the partners on other accounts, jointly obtain a decree for the sale of any of the separate estates of the partners liable under the 33 Geo. 2? They certainly could not do so by proceeding against the public officer, for he represents only the joint estate of the banking company. The appellants, the banking creditors, can recover the joint estate only by an execution against him, not the separate estate of any of the partners, nor, for the same reason, can they recover against the official manager, for he represents the joint estate only. The sole method of recovering satisfaction by them against the estates of individual partners is by a *scire facias* by the plaintiff in an action against each partner, founded on the judgment in that action. On the other hand, if the appellants are not banking creditors, but general creditors, they could have no remedy at all against the joint estate, represented by the public officer and the official manager; their only remedy is against the individuals. To make the partners liable under 33 Geo. 2, c. 14, the proceeding must be against them individually, and this forms another decisive objection to the proceeding in its present form, as the individual partners all, or some on behalf of the rest, are not made co-defendants. The suit, therefore, as it is now constituted, cannot succeed.

* 185 For the * reasons, however, before given, if the objection resolves itself into the mere want of parties, it ought not to prevail to the extent of reversing the judgment altogether, and dismissing the suit.

But it appears to me that the proceeding under the 6 Geo. 4 is altogether inapplicable to companies formed under the 33 Geo. 2, c. 14, and on this point I entirely concur in the reasons assigned by the Lord Chancellor in his judgment.

The 6 Geo. 4 gives to the creditor of the company a remedy against the company, by allowing him to sue the public officer for all debts and claims due at law or in equity, and at the same time deprives him of all remedies against the individual debtors for the same debts or claims. This prohibition, therefore, prevents him from having the advantages which the 33 Geo. 2, c. 14, gives in suits by a creditor of the bank against individual bankers, for it deprives him of all power to bring a separate suit against any or all the partners. But it would not affect a remedy for the equal distribution of all the estate and effects of the company and of the individual partners, amongst the creditors, by a commission or fiat in bankruptcy, if the law permitted such to be issued against the company, nor would it affect any analogous proceeding which is still applicable. If the Statute 11 & 12 Geo. 3 (the Irish Bankruptcy Act) superseded the 33 Geo. 2, as my noble and learned friend, who has much considered the subject, thinks it did, there is an end to the question. That is, however, rather contrary to the opinion of Lord Clare, in the case of *Hayden v. Carroll*.¹ I have not myself considered that subject much. I thought it unnecessary to do so. If there is any other statute applicable

* 186 to a joint stock bank, under which a * commission or fiat in bankruptcy could be maintained at the time this suit was commenced against a joint stock company in Ireland, that course ought to have been pursued, but if not, we cannot, on account of the apparent expediency of allowing such a remedy for all the creditors, give the Statute of the 33 Geo. 3, c. 14, the effect of a commission of bankruptcy against the whole company, if it has not that effect already. The question, therefore, seems to me to come to this, whether the 33 Geo. 2 gives a remedy for the benefit of all creditors equally, and is applicable to joint stock banks. That statute gives an additional advantage in the suit

¹ 3 Ridgw. Parl. Cas. 545.

against individuals by each creditor for his debt, by avoiding unregistered conveyances, grants, sales, and conveyances to sons and grandsons, and receipts given after the absconding banker has stopped payment. Of these the banking creditor, as such, cannot avail himself, for he cannot sue individuals at all.

The eighth section is the important one in the present inquiry. It does appear to give a remedy for all a banker's creditors, of whatever description, without any regard to priority or preference in payment, and that can certainly only be done by suing in the Court of Chancery for the purpose of compelling such an equal division, analogous to that which would have been given under the tenth section, if the bankers had executed a deed conveying all their real and personal estates to trustees for payment of their debts. The appellants being banking creditors have rights entirely distinct from the general creditors; rights directly attaching to the joint fund, and only indirectly to the separate estate of each individual partner. The general creditors have rights directly attaching to the separate estates, and none directly to the joint fund. They have only a remote interest in the shares in the ultimate surplus. How can those bank creditors gain the right to have the separate * estates of the partners sold for * 187 their benefit by joining with the other creditors, they being deprived of all such right by the Act 6 Geo. 4, and confined to the remedy given by that statute? I do not see how these two classes can take the benefit of the general distribution under the eighth section.

I also concur in the reasons so clearly and distinctly stated by my noble and learned friend on the Woolsack, and approved of by both my other noble and learned friends who have preceded me, as to the difficulties which arise in case of death. For all these reasons, therefore, I think that the 6 Geo. 4 and the 33 Geo. 2 are irreconcilable, and that the latter affirmative statute must be considered as repealing the former according to the general rule in such cases, and I concur entirely with them in thinking that the judgment in this case must be affirmed; and further, that considering the doubts that have been entertained upon this subject, and that there have been two conflicting decisions in the Irish Courts, it ought to be affirmed without costs.

Mr. Shapter suggested, on behalf of the respondent, Thomas

Hone, with regard to his right to costs, that he had been brought before the Court in Ireland, and before this House, not to litigate this question as to which of these two Acts was applicable to the case, for he had no interest in that, but to litigate a different question which had not been argued, namely, whether he, as a shareholder under the Act 6 Geo. 4, had or had not validly transferred and got rid of his shares long before the Tipperary Bank stopped payment. He contended that he had validly transferred them; he was, therefore, entitled to his costs of being brought here.

The Attorney-General, on behalf of the official manager, asked their Lordships to direct that he should be at liberty to retain his costs out of the estate.

*188 * LORD ST. LEONARDS. — This House cannot give any directions upon the subject, you must take the order of the Court below.

THE LORD CHANCELLOR. — The official manager and other persons in his position, when they intervene as such, have ordinarily a right to their costs, but that is not a question properly before the House. It must be disposed of in the Court of Chancery in Ireland.

Decretal order affirmed, and appeal dismissed.

Lords' Journals, July 9.

*189 • COLLEGE OF ST. MARY MAGDALEN v. ATTORNEY-GENERAL.

1857. May 14, 15, 18, 19; June 13.

The PRESIDENT and SCHOLARS of the COLLEGE OF	} <i>Appellants.</i>
ST. MARY MAGDALEN, OXFORD, . . .	
THE ATTORNEY-GENERAL,	<i>Respondent.</i>

Charity Trusts. Statute of Limitations. Attorney-General. Purchasers for Value.

The presumption in a gift of lands for charitable purposes, is that they are devoted "for ever" to the purposes of the charity, and that no authority to sell them is intended; but a sale of such lands at a distant date, with long acquiescence in such sale, and no account of the origin of the charity, may give rise

to a presumption that there had been a power enabling the holders of the charity lands to sell them, and that the sale was made under that power.

Charities are trusts, and are, as such, within the operation of the 3 & 4 Wm. 4, c. 27.

The first section of the statute extends the word "person" to a class of persons as well as to individuals. The poor of a parish are a class of persons within the meaning of that section.

Where the Attorney-General, having no independent rights of his own, stands only in the same situation as those who are entitled to the benefit of a charity, if they would be barred by lapse of time, he is equally barred.

Lands were given for the benefit of the poor of two parishes, and were placed under the management of the rectors and church-wardens, who, with the consent of the vestries, might lease them. The rectors, &c. executed a lease of them for ever to the president and scholars of a college subject to a fixed rent charge. Above sixty years after the execution of this lease (the fairness of which at the time of its execution was not impeached), the Attorney-General filed an information against the lessees, praying that it might be cancelled:—

Held, that the real plaintiffs in this suit were the poor of the two parishes; that they were in the situation of a *cestui que trust*; that the suit by information of the Attorney-General (who had no independent rights) was a suit by them; that they could not maintain such suit unless against their trustees except within twenty years; that this was not such a suit, but was a suit against purchasers for value, and therefore that it was barred.

For a long period previously to the reign of George II. the parish of St. Olave, Southwark, possessed a narrow strip of waste land, on the south side of Tooley Street, lying between that street and some land belonging to the president and scholars of Magdalen College, Oxford, called the * "Isle of Ducks," from * 190 which it was separated by a common sewer. By the Act 6 Geo. 2, c. 11, the ancient parish of St. Olave was divided into the two parishes of St. Olave, Southwark, and St. John, Horsleydown; and it was thereby enacted that all charities and donations that had theretofore been granted to and for the benefit of St. Olave, Southwark, should be divided between the two parishes in the following manner; that three fifths should be for the sole use and benefit of the old parish, and that out of the revenue of the other two fifths there should be paid to the church-wardens of the old parish the annual sum of 29*l.*, free of taxes, &c., for the benefit of the poor of the old parish, and that the residue of the two fifths should be for the benefit of the new parish; that the rector or senior church-warden of each of the parishes should jointly "collect the charities, donations, &c. and should and might, with the consent of the vestry of each parish, make leases of the lands, &c. so

given for charitable purposes, and should do, perform, and execute all and every such acts and things relating to the management of the said charities, in such manner as the church-wardens of St. Olave, Southwark, could or might have done, before the division of the parishes and the passing of the Act." Leases, sometimes of a long date, had, on different occasions, been made of this parish property. In the year 1786 there were several discussions in the vestry on the subject of these parish lands. On the 5th of December, 1786, there was a notice of meeting, "to take into consideration proposals for the renewal on lease of" the lands in question, which were then leased to a private individual. These proposals were to surrender the existing lease, and to take the premises on a building lease, for ninety-nine years, at a peppercorn for the first year, and 12*l.* a year for the remainder. This was not ac-
 * 191 cepted. By a resolution of the vestry of St. * John's, of that date, the church-wardens were ordered to meet the church-wardens of St. Olave's, "to treat with any persons for the letting of the ground and premises"; and they were empowered to "execute one or more lease or leases for ninety-nine years, on such terms and restrictions as they shall think fit." There were other notices and resolutions of a similar sort; and at a vestry of St. Olave's on the 19th February, 1798, notice of another vestry was given, at which these matters were debated, and it was unanimously resolved, "that the officers and auditors of this parish be empowered, with the officers and auditors of St. John, to meet and treat with the persons empowered by Magdalen College, Oxford, or any other person, for the letting or disposal of the ground belonging to these parishes bounded by the Isle of Ducks." A similar resolution passed at St. John's, but could not be proved, as the vestry books there, of that period, had been lost. An agreement to lease this ground in perpetuity to the "president and scholars of Magdalen College, at a rent of 15*l.* per annum, secured by a rent charge on the land," was ultimately made.

To carry this agreement into effect, a fine *sur consauance de droit* was levied on the 3d of March, 1790, and an indenture or deed of feoffment was, on the same day, executed. The Rev. James Erans, rector of the parish of St. Olave's, the church-wardens, and two of the principal inhabitants of that parish were parties of the first part; the Rev. Richard Penneck, rector of St. John, the church-wardens, and two of the principal inhabitants of that parish, of

the second part ; and the president and scholars of the college of St. Mary Magdalen, of the third part ; and by this deed, in consideration of a perpetual annuity or rent charge of 15*l.* per annum secured to the said rectors, church-wardens, principal inhabitants, &c. ; by an indenture bearing even date therewith, they did grant unto the said president and scholars, * and their suc- * 192 cessors, the land in question (the metes and bounds of which were particularly described), to hold the same to the said president and scholars, their successors and assigns, for ever. An indenture, in the usual form, charging this annuity of 15*l.* on the lands thus described, and also on the Isle of Ducks, was executed on the same day as the deed. This indenture also contained a declaration that the parties thereto of the second and third parts (the rectors, &c. of the two parishes) " should stand seised of the said annual sum or yearly rent charge of 15*l.*, upon trust to apply the same for the service and benefit of the said parish," in the manner prescribed by the hereinafter-mentioned Act of Parliament, " the rent charge to be received and taken by the rector or senior church-warden of each of the said parishes."

These indentures were duly enrolled in the Court of Common Pleas, at Westminster. The president and scholars entered into possession of the land, covered up the old sewer, made a new one, added part of their land to Tooley Street, which was thereby considerably widened, and then let the rest on building leases ; and houses had been built thereon, partly on the old lands of the college, and partly on that which had been thus acquired. The rent charge was regularly paid up to Michaelmas, 1847, when the parish officers of the two parishes refused to receive it.

On the 31st January, 1852, the present information was filed by the Attorney-General, at the relation of some, and on behalf of all the inhabitants of the two parishes, against the president and scholars of St. Mary Magdalen, and against the church-wardens and overseers of the parishes, stating that the land was held by the rectors and church-wardens for charitable purposes for the benefit of their two parishes ; that the rents and profits had always been applied for the benefit of the two parishes ; that the rectors and * church-wardens had no power to alienate the * 193 land ; and that the consideration given for the alienation was inadequate ; and the information prayed that the deed might be delivered up to be cancelled ; that possession of the land might

be given up; that accounts might be taken, and for the usual relief.

On the 14th February, 1852, the appellants filed their answer, and, in addition to defences on the merits, insisted on the Statute of Limitations, 3 & 4 Wm. 4, c. 27.

The cause was heard before the Master of the Rolls, in January, 1854, and his Honour then expressed his opinion that the transaction, though perfectly free from any imputation of sinister motive, amounted to a breach of trust, and could not therefore be supported, but took time to consider the question as to the Statute of Limitations; and on March 23, 1854, delivered his opinion that that formed no bar to the information, and made a decree accordingly.¹

This was an appeal against his Honour's decision.

Mr. Roundell Palmer and *Mr. Chandless* (*Mr. Shapter* was with them) for the appellants. — The first question is, whether the conveyance of this parish land is impeachable in equity; next, whether it is capable of being set aside, having regard to the Statute of Limitations, 3 & 4 Wm. 4, c. 27.

As to the first of these questions, it is clear that from the earliest time when this slip of land is known to have been in the possession of the parish, the church-wardens, and the incumbent had assumed and exercised the power of dealing with it as with property over which they had an absolute control; they had granted leases for twenty, and even for fifty years, without building cove-

nants, and at a small rent; what they had now done could not therefore be impeached. On the one hand, the appellants were neither bound nor entitled to examine into the validity of powers which had thus, again and again, been exercised; nor, on the other hand, were the rectors and church-wardens bound to state the origin and extent of these powers, or to show all the authorities they had, but the presumption must be that they had acted within their jurisdiction: *Goodtitle d. Baker v. Milburn*.² In fact the words of the resolution show that they had a power of "disposal of" the property, which phrase must mean more than the grant of an ordinary lease. The appellants were entitled to consider themselves safe in dealing with persons by whom such powers had frequently before been exercised, and the exercise of which had never before been disputed.

¹ 18 Beav. 223, 233.

² 2 M. & W. 853.

If, however, the appellants are not absolutely protected from having the transaction questioned, the burden of showing a right to question it lies on the respondents, and that right must be clearly and satisfactorily established. It has not been established here. On the contrary, the information itself sets out certain Acts of Parliament which strongly imply, though they may not actually express, the existence of an authority on the part of the rector and church-wardens to deal absolutely with this property.

There are no circumstances here which raise any equity adverse to the appellants; all the evidence shows that whatever may now be the value of the property, occasioned by the improvements which the appellants have effected, the bargain entered into with them was at the time fair and equitable. The parish property was of very little value if it could not be used with the college property; it was only by being joined together that they could be converted to any beneficial purpose. Such cases as *The Attorney-General v. Pilgrim*¹ and *The Attorney-General v. Kerr*² are, therefore, inapplicable. Assuming that a rector and church-wardens are trustees for the parish, the 59 Geo. 3, c. 12, § 17, expressly gives to them the powers of a body corporate with respect to lands held in trust for the parish, and under that statute parish officers have been held to have the legal estate vested in them, so as to be able to dispose of it, *Doe d. Jackson v. Hiley*,³ *Smith v. Adkins*;⁴ and in *Deptford v. Sketchley*⁵ the same principle was recognised, but the statute was there held inapplicable, because there were already trustees in whom the legal estate was specifically vested by the original conveyance. Nothing exists here to show that the property has been treated inconsistently with the terms of the trust. In *The Attorney-General v. Stephens*⁶ it was said by the Lord Chancellor in a case of this very kind, that where circumstances justify it, he should have no difficulty in inferring that the parish officers had "by the terms of their title to the land, a power to make such an arrangement," and that will be done, as stated by Lord Mansfield in *Eldridge v. Knott*,⁷ "from a principle of quieting the possession."

It may now be taken as settled in equity, that in a proper case, trustees have the power to alienate charity property. *The Attor-*

¹ 12 Beav. 57.

² 2 Beav. 420.

³ 10 B. & C. 885.

⁴ 8 M. & W. 362.

⁵ 8 Q. B. 394.

⁶ 6 De G., M. & G. 111, 149.

⁷ Cowp. 214.

ney-General v. The South Sea Company; ¹ that decision was founded on *The Attorney-General v. Warren*,² and *The Attorney-General v. Hungerford*³ (where the observations of Lord Brougham on * 196 this point * are very strong), and is justified by *The Attorney-General v. Pembroke Hall*,⁴ and *The Attorney-General v. Hart*.⁵ Here, too, the rector and church-wardens had under their private act a general power of leasing, and the Court therefore will not inquire into the degree of discretion with which that power was used; *The Attorney-General v. Moses*,⁶ *The Attorney-General v. Wray*.⁷

But at all events the suit here is barred by the operation of the 3 & 4 Wm. 4, c. 27. Up to the twenty-fourth section of that statute, all the enactments apply to cases at law, but that section makes them applicable to suits in equity. That application is universal, and is not restricted to the case of mere personal trusts, but affects cases of charity property. *The Incorporated Society of Protestant Schools v. Richards*,⁸ *The Attorney-General v. Perse*,⁹ and *The Commissioners of Charitable Donations v. Wybrants*.¹⁰ The twenty-fifth section includes everything, whether of trust or not, except one case which is specifically excepted; that was in accordance with the general policy of the Act. The word "person" in the first section is declared to apply to "a body politic, corporate, or collegiate," and from this there is no exception of the recipients of a charity or the poor of a parish.

In this case, too, there has been a conveyance for value. The statute was expressly intended to protect purchasers for a valuable consideration. There is nothing to define and limit any class of persons by whom the conveyance must be made. On the contrary, the word "successors," which certainly must include rector and church-wardens, is (§ 1) expressly introduced, and as to a * 197 purchaser, * the time (§ 25) begins to run against them from the date of the conveyance.

[THE LORD CHANCELLOR. — The Master of the Rolls thought that the statute did not apply here, because of the character of the Attorney-General, who institutes this suit.]

That does not really affect the case. The statute runs against

¹ 4 Beav. 458.

² 2 Swanst. 291.

³ 2 Clark & F. 357, 8 Bligh, N. S. 437.

⁴ 2 Sim. & S. 441, affirmed 1 Russ. & M. 751.

⁵ Prec. Ch. 225.

⁶ 2 Madd. 294.

⁷ Jac. 307.

⁸ 1 Dru. & War. 258.

⁹ 2 Dru. & War. 67.

¹⁰ 2 Jones & L. 182.

the Attorney-General in cases of this kind, for he comes in, not in his own right or in that of the Crown, as such, but as the representative of persons, in respect of whose rights the Crown possesses a fiduciary character, and has a fiduciary duty to discharge. *Eyre v. The Countess of Shaftsbury*,¹ which was approved of by Lord St. Leonards, in *The Incorporated Society, &c. v. Richards*.² The rule as to the intervention of the Attorney-General is thus expressed in Mitford on Pleading: ³ "Suits on behalf of the Crown, and of those who partake of its prerogative, or claim its peculiar protection, are instituted by officers to whom that duty is attributed. These are, in the case of the Crown, and of those whose rights are objects of its particular attention, the king's Attorney or Solicitor General. As these officers act merely officially, the bill they exhibit is by way, not of petition or complaint, but of information to the Court, of the right which the Crown claims on behalf of itself or others, and of the invasion or detention of those rights for which the suit is instituted." The name of the Attorney-General in such a suit is therefore a mere form, and it is no more his suit than an action at law is the action of the attorney whose name appears on the record.

There was here no impediment to the suit which rendered the interference of the Attorney-General a matter of necessity, and so gave it a purely official character. The rector, church-wardens, and overseers for the time being might have sued. *Doe d. Higgs v. Terry*,⁴ *Doe d. Hobbs v. Cockell*,⁵ *Fairtitle v. Gilbert*,⁶ or the parishioners themselves might have sustained a suit for this purpose. *Bromley v. Smith*⁷ shows that the Attorney-General need not be a party to a suit where some only of a larger body corporate institute it. The only objection raised to their right to sue was in an observation of the Master of the Rolls, that as there were two parishes jointly interested, the Statute of Limitations might not apply; but that is answered by the 36th section of the 59 Geo. 3, which declares that nothing in that Act shall be taken to alter, abridge, or affect the powers given by any local Acts with respect to the maintenance of the poor; and here the local Act gave the same powers to the officers of the two

¹ 2 P. Wms. 103 - 118, Wilm. Notes, 24.

² 1 Dru. & War. 258.

³ 3 ed. p. 17.

⁴ 4 A. & E. 274.

⁵ 4 A. & E. 478.

⁶ 2 T. R. 169.

⁷ 1 Sim. 8.

parishes as had originally belonged to the parish out of which the two were formed.

Mr. Lloyd and *Mr. Hinde Palmer* for the Attorney-General. — There has been an improvident alienation of this charity property, and the right of the Attorney-General to relief against such an alienation is not barred by the Statute of Limitations.

No presumption is to be made in favour of the appellants as to their supposed want of knowledge of the title of the parish officers, for they were perfectly well aware what was its nature. That point may therefore be considered out of the case, but if otherwise, then *The Attorney-General v. Pargeter*¹ shows that where the title on the face of it discloses an equitable objection, the purchaser is bound to show that the title is valid.

* 199 * The object of the 6 Geo. 2, c. 11, was the division of the original parish into two parishes, and the allotment to each of a fixed proportion of the parish estates. The power given to the rector and church-wardens was merely a power to collect the rents; they had no power to lease except with the consent of the vestry, and no power is given to the vestry to part with the fee of parish property. Here no consent of the vestry (even if the power to give such consent existed) is shown to this alienation of charity property, and the vestry only appears to have been summoned to consider the grant of a renewal of an existing lease for a term of years, whereas the act done was to alienate the land for ever. The words "disposal of" in the vestry resolution of 1788 do not justify this proceeding, for they must be taken in connection with the other words of that resolution, and must receive with them a limited construction, namely, the disposal of the property only for a term of years, and by way of lease. Every thing done beyond that was *ultra vires* of the Parliamentary power by which alone an alienation of charity property can be justified, for the principle of the law is that it is not in its nature alienable, *Kirkham v. Chadwick*.² The burthen of supporting such a transaction lies on the person who performed it. A sale of charity property ought only to take place after an application to Chancery, and when the Court had been satisfied that it would be for the benefit of the charity. *In re Parke's Charity*.³ It is clear that it may be impeached. *The*

¹ 6 Beav. 150.

² 12 Sim. 329.

³ 13 Ves. 550, by Sir W. Grant.

Attorney-General v. Green; ¹ *The Attorney-General v. Brooke*; ² *The Attorney-General v. Pilgrim*; ³ and *The Attorney-General v. * Hall*.⁴ *The Attorney-General v. Hungerford*⁵ shows * 200 that a Court of equity is bound to consider all the circumstances under which the alienation has been made, and the observations of Lord Brougham there as to alienating the land must be considered as *obiter*, and have been so treated by a very high authority. Lord St. Leonards, in speaking of them in the "Law of Property,"⁶ says: "These observations were not necessary for the decision of the case before the House, and it would be unsafe to act upon them; no prudent trustees of a charity would venture to sell, and of course no prudent purchaser would accept a conveyance from them. The power of the Court depends upon a different principle"; and he refers to the *Corporation of Newcastle v. The Attorney-General*,⁷ and other cases. One of them is *The Attorney-General v. Newark-upon-Trent*,⁸ where the corporation was not allowed to sell charity lands which in the course of time had become intermixed with its own. In *The Attorney-General v. The South Sea Company*,⁹ the bargain was altogether beneficial to the charity, and so was not impeached. The case of *Attorney-General v. Hart*¹⁰ is not in point, because there the trustees of the charity had acted in accordance with the directions of the vestry, the representative of the *cestuis que trust*, and of course that made the alienation valid; and in *The Attorney-General v. Pembroke Hall*,¹¹ the arrangement was provident at the time it was made, and only became otherwise by accidental circumstances which afterwards happened. *The Attorney-General v. * Moses*,¹² and * 201 *The Attorney-General v. Wray*,¹³ are not in point, for in both of them the leases were made by persons who had by Act of Parliament an unlimited power of leasing. But *The Attorney-General v. Griffith*¹⁴ shows that even a long lease of charity lands may be set aside though granted at a rent fair at the time of making it; but as Lord Eldon said,¹⁵ "not increasing in seventy years," a

¹ 6 Ves. 452.² 18 Ves. 319.³ 12 Beav. 57.⁴ 16 Beav. 388.⁵ 2 Clark & F. 357, 8 Bligh, N. S. 437.⁶ 2 Sim. & S. 441, affirmed 1 Russ. & M. 70.⁷ 2 Madd. 294.⁸ Jac. 307.⁹ Ed. 1849, p. 535.¹⁰ 12 Clark & F. 402.¹¹ 1 Hare, 395.¹² 4 Beav. 453.¹³ Prec. Ch. 225.¹⁴ 13 Ves. 565.¹⁵ 13 Ves. 575.

fact which he held to justify the Court in calling for an explanation, and for proof that the lease was reasonable.

Then as to the Statute of Limitations. There is nothing in that statute which applies its provisions to charity estates. That statute was meant to reduce all remedies for the recovery of real estate to the condition of actions of ejectment, and to make the rules of law applicable to suits in equity. But it had regard to legal rights, and the corporations mentioned in the preamble to the statute are those having a direct legal interest in the subject. The word "person" may in that sense apply to them, but not to corporations, which are mere trustees for others. Such cases were not included in the earlier Acts. *The Attorney-General v. Christ's Hospital*,¹ which was the last case before the statute, decided that length of time will not prevail against charity trusts where the land was purchased with notice of them; *The Attorney-General v. Brettingham*² is to the same effect. It was so purchased here. Both parties to the transaction knew the nature of the property and the purposes to which it was applied. In *The Incorporated*

Society, &c. v. Richards,³ Lord Chancellor Sugden intimated * 202 an opinion, that cases of this kind were not included * in the 3 & 4 Wm. 4, c. 27, but appeared to have constituted a *casus omissus*. It is true that in *The Commissioners of Charitable Donations v. Wybrants*,⁴ his Lordship applied the statute in the case of a charity, but assuming this latter decision to be correct, still the statute does not apply here, for here there was no one in existence against whom it could begin to run. In *The Attorney-General v. Perse*,⁵ where a rent charge was created as a salary for a schoolmaster, Lord Chancellor Sugden held that the statute did not begin to run until after the appointment of the schoolmaster had taken place. That rule applies here. There must be a legal right to be enforced, and a person legally entitled to enforce it. Thus, suppose there was a charity to raise portions for a certain number of poor maidens to be nominated by the Lord Mayor, it is clear that no poor maiden before nomination could have a right to the fund, and none therefore could sue for it, and consequently no one could be barred till from the time when that right accrued. The present case is exactly in that condition. There is no one here

¹ 3 Mylne & K. 344.

⁴ 2 Jones & L. 182.

² 3 Beav. 91.

⁵ 2 Dru. & War. 67.

³ 1 Dru. & War. 258.

entitled, as of legal right, to enforce the provident administration of this fund. The Attorney-General is therefore a necessary party to the suit. There are no terms in the statute which embrace either the Attorney-General, or the indefinite and unascertained objects of a charity. It is, therefore, inapplicable here. The word "successor," in the interpretation clause, is the only word that appears to bear any such meaning, but that word cannot be applied to the poor of this day as the "successors" of the poor of the day when this transaction took place, for one does not claim by, through, or under the other. The principle stated in *Kidney v. Coussmaker*¹ * must be applied in the present case. * 203 There lands were devised for debts, and the question was, whether the creditors were barred by lapse of time, and Sir W. Grant held that they constituted a class, and so were not within the ordinary rule as to laches of individuals; yet there the creditors were persons capable of possessing legal interests and of enforcing them. That is not the case here; the poor do not form a class, but each individual stands on his own individual right. They have no rights as successors, and therefore can have no disabilities as such.

[LORD WENSLEYDALE. — This is not a right of an individual pauper to relief, but is a trust for the benefit of the inhabitants who are liable by statute to relieve the poor. There must be some mode in which they could sue.]

[*Mr. R. Palmer* mentioned the cases of the parish of Clerkenwell, *The Attorney-General v. Rutter*,² and *Sellon v. Nicholls*,² where all the inhabitants claimed a right to present to the living, and where they had instituted a suit to enforce that right.]

If the trustees in such a case disregard their duty, the Attorney-General alone can protect the *cestui que trust*, and as between him and the trustees, or those who claim under them, the statute cannot be a bar, *Lewellin v. Mackworth*.³ An information of the Attorney-General is no doubt "a suit" within the meaning of the 24th and 25th sections of the statute; but as no object of the charity could bring it without the *fiat* of the Attorney-General, the delay of the Attorney-General cannot affect his rights. At the same time the right of the Attorney-General to protect the charity would exist notwithstanding a concurrence on the part of the objects of

¹ 12 Ves. 136.

² 2 Eq. Cas. Ab. 579, pl. 8.

³ 2 Ross. 101, n.

the charity in the misapplication of the estate. *Corporation*
 * 204 *of Newcastle v. The Attorney-General*,¹ and there is no instance of the Attorney-General being barred by the operation of the Statute of Limitations where he appeared by information to enforce a charitable use.

In the same way the statute has been held not to apply in a case of mere want of actual possession, *Smith v. Lloyd*,² or of a rent reserved on a demise, *Grant v. Ellis*,³ nor to tithes under 2 & 3 Wm. 4, c. 100; *The Dean of Ely v. Bliss*.⁴ Where there is no personal representation the statute will not, even as regards bills of exchange, begin to run till the grant of letters of administration, *Murray v. The East India Company*.⁵ That principle must be applied here. Suppose a charity for maintaining a school, the children thereby intended to be benefited must be perpetually incapable of suing. The language of the statute cannot be applied to persons labouring under a perpetual legal disability. The Attorney-General here represents the Crown, and appears for persons who never possessed the legal means of interfering for themselves. In such a case the Statute of Limitations cannot be made applicable to bar their rights.

Mr. C. Hall appeared for the parishes, but did not address the House.

Mr. R. Palmer, in reply. A *cestui que trust* may be bound by length of time operating against his trustee, if, possessing the power to compel the trustee to do his duty, the *cestui que trust* does not use that power, *Hovenden v. Annesley*.⁶ That is
 * 205 exactly the situation of the parishes * here. The principle of the Courts as to the Statutes of Limitations is not to minimize their application, *Salkeld v. Johnston*.⁷

THE LORD CHANCELLOR, after stating the case, said: Though there certainly is not, as far as I am aware, any positive law which prohibits the sale of charity lands, yet it is obvious that such a sale can very rarely be justified. For, in the first place, it is plain

¹ 12 Clark & F. 402.

² 9 Exch. 562.

³ 9 M. & W. 113.

⁴ 2 De G., M. & G. 459.

⁵ 5 B. & Ald. 204.

⁶ 2 Sch. & L. 607, 629.

⁷ 1 Macn. & G. 242, 1 Hall & T. 329.

that persons who give lands to a charity devote them for ever to the purposes of that charity, and such is always the expression used in such gifts, the gifts being made to the charitable object "for ever." With the belief that the charity will endure for ever, it is extremely improbable that they can have contemplated the sale of the lands, or that they can be considered as having intended to give authority to sell them. Where the origin of a charity does not appear, and a sale has taken place at a very distant date, and has since been acquiesced in, those facts may afford ground to presume that there was originally power to sell. Such a presumption, where circumstances warrant it, may reasonably be made in favour of long enjoyment. The enjoyment, independently of the Statute of Limitations, could not have been lawfully had without such a power, unless there were circumstances to justify the sale. In cases of that sort, therefore, if there has been long enjoyment under a sale, and no account of what the origin of the charity was, the presumption is not unreasonable that there might have been, although we do not discover it, a power to enable the parties holding the charity lands to sell them, and that it is under that power that the sale has been made.

* Now, here reliance was placed upon the fact that this * 206 charity property had been enjoyed ever since the end of the seventeenth or the beginning of the eighteenth century, in a way entirely inconsistent with the notion that there was not a power of dealing with it, at all events, in some mode different from that in which charity lands are ordinarily dealt with, because there had been, certainly on two or three occasions, leases granted by the parish which are clearly inconsistent with what is considered the ordinary management of charity property, one lease for fifty years, which ended in 1730 or thereabouts, and another lease for sixty-one years, which did not terminate until 1798; and it was contended that, in whatever way this land might have come into the possession of the parish of St. Olave, these were circumstances that led to the presumption that the parish officers had more than the ordinary power of charity trustees in dealing with this land, and that consequently the sale in 1790 to Magdalen College might be justified.

The Master of the Rolls was, however, of opinion, that in this case there were no circumstances showing the sale to have been expedient, and that there had not been such a length of enjoy-

ment as would justify the presumption that there was a power of sale. In that view of the case I am strongly inclined to concur.

But the question then arises whether the last Statute of Limitations presents a bar. The Master of the Rolls thought it did not. If this had been an ordinary trust, not for a charity, but for an individual, the statute certainly would have afforded a bar. The sections upon which reliance were placed were the 1st and 2d, and 24th and 25th. [His Lordship read them.]

Those are the enactments that relate to ordinary trust estates; but the Master of the Rolls considered that charities
 * 207 * are not within the operation of the statute. My lords, I have given to this case my best attention, and I feel bound to say that in that view of it I cannot concur. Before the late statute, Courts of equity were not bound by former Statutes of Limitations in dealing with trust estates, but their proceedings were in analogy to those statutes. Where they had to deal with legal interests, they acted in obedience to the statutes, but not so in respect to trust estates. Obedience implies command; and as the statutes were silent as to trusts, there was no command to be obeyed. They did, however, act in analogy to the statutes, for reasons which will be perfectly obvious, considering the large proportion of property in this country which is held as trust property, and not by persons having a legal interest. It would have been extremely inconvenient if there had not practically been the same rule acted upon in Courts of equity as in Courts of law. With respect, however, to that particular species of trust which had charity for its object, Courts of equity did not follow the analogy of the statutes. The grounds of distinction were, that laches cannot be imputed in cases of charity, and perhaps also there was a leaning towards such a mode of applying property, and this feeling might likewise operate, that the parties most interested are generally among the classes most in need of aid, and least able to assert their rights. These, I presume, were the principles on which the Courts acted in refusing to consider the Statutes of Limitations as a guide, even by way of analogy, when they were dealing with charity estates. I must, however, remark that, from my experience, I have come to the conclusion that this practice has frequently led to very great hardship, and that in attempting to be just towards certain classes, such as the poor, the consequence

often was that there was great injustice done to the classes above them.

* The question, however, now is, what has been the effect * 208 of the late statute? Are charities within those two sections, 24 and 25, or are they not? I have come to the conclusion that they are. These sections apply in terms to all trusts. Charities are trusts, a favoured sort of trust, no doubt; but still a charity is a trust, and nothing more. Lord St. Leonards remarked truly, that charities, *eo nomine*, are not mentioned in the statute, and expressed his surprise that that omission had occurred; but that is not material, for trusts generally are mentioned, and that includes charitable trusts, unless they are expressly excepted, and there certainly is no such exception. The right is barred by section 24, unless in a case where section 25 prevents its operation; and in this case it could only prevent the operation of section 24 if the college had held the land on an express trust for the charity, which it certainly did not.

There has been no express decision on the subject; but the question has been more than once considered by Lord St. Leonards when he was Lord Chancellor of Ireland. First, in the case of *The Incorporated Society of Protestant Schools v. Richards*,¹ where there had been a written acknowledgment which took the case out of the operation of the statute; therefore, whatever was the law upon the subject, Lord St. Leonards, then Lord Chancellor of Ireland, said it certainly could not apply in that case.

Secondly, there came before him the case of *The Attorney-General v. Persse*.² There the testator had directed a school to be built, and had charged his estate with an annuity for the benefit of the schoolmaster. Lord St. Leonards held that until a schoolmaster was appointed the trust, consisting of the payment of an annuity for his * benefit, could not arise, and as no * 209 such appointment had been made, the statute had not begun to run.

Lastly, there was the case of *The Commissioners of Charitable Donations v. Wybrants*.³ In that case there had been a devise of real estates to trustees in fee, upon trust to convey them to certain persons in strict settlement charged with the payment of annuities for the benefit of various charities. Lord St. Leonards

¹ 1 Dru. & War. 258.

² 2 Jones & L. 182.

³ 2 Dru. & War. 67.

held, that so long as the fee remained in the trustees, the statute did not operate, the trust reposed in them being an express trust within the exception of the 25th section. And his Lordship further expressed his opinion to be, that even if the trustees had made a conveyance according to the directions of the will, still the statute would not have operated, for that the persons taking under the conveyance would have been, as between themselves and the charities, trustees holding on an express trust the charitable charge, subject to which the conveyance was to be made, being in substance a trust, and an express trust. In that case, however, he expressed a clear opinion that charitable trusts are barred by the statute, unless they are brought within the exception of the 25th section : I have reason to know that subsequent consideration has in no respect altered his Lordship's opinion.

In the report of the judgment of the Master of the Rolls in the present case, his Honour expresses his concurrence in the view of the statutes thus taken by Lord St. Leonards. But he considered that here the bar created by the 24th section did not apply. He was of opinion, first, that the Attorney-General was not a person claiming any estate or interest within the meaning of the statute ; and, secondly, that, putting the Attorney-General out of the

*210 *question, there were no other persons who could have instituted such a suit, and therefore he likened the case to that of the charity for the schoolmaster in *The Attorney-General v. Perse*. I concur with his Honour in thinking that the Attorney-General is not a person claiming any estate or interest within the meaning of the statute. The Attorney-General is only a part of the machinery by which the rights of others are sought to be enforced. He is no more a party claiming a right than, in an ordinary action at law, the attorney on the record is such a person. We must look at the real litigants in this case, and not at those by whose intervention the rights in dispute are endeavoured to be sustained.

But here I feel bound to say I differ from the Master of the Rolls. The parties really seeking relief in this suit are the poor of the two parishes of St. Olave and St. John. I am clearly of opinion that they are "a class of persons" within the true intent and meaning of the interpretation of that phrase given in the first clause of the statute. Section 24 creates an equitable bar against any "person" asserting an equitable right to land ; and in the

interpretation clause we are told that the word “‘person’ shall extend to a body politic, corporate, or collegiate, and to a class of creditors and other persons; as well as an individual” ; and I am of opinion that the poor of the parish constitute a class of persons within the meaning of that interpretation clause. I think so, because the second section enacts that no “person” shall bring an action to recover land but within twenty years next after the time at which the right to bring such action shall have first accrued, that is, adopting the interpretation in the first section, the poor of the parish shall not bring an action but within twenty years. This, therefore, would prevent the poor of the parish from bringing an action after the prescribed time. But here *there *211 is no question as to an action. This is a suit in equity by or on behalf of the poor of the parish. How does the statute apply to such a proceeding? Section twenty-four enacts that no person shall bring any suit in equity to recover any land but within the same period within which he might have brought an action at law if his right had been a legal right. This section, therefore, bars the equitable, just as section two had barred the legal remedy. The right of the poor of the parish must be either a legal or an equitable right. There is no third class of rights known to our law, and by one or other of these sections the right, whether legal or equitable, is barred, unless indeed the right, treating it as equitable, is saved by the 25th section. The effect of this clause is to save the right of the *cestui que trust*, that is, in this case, the right of the poor against the trustee, but not against purchasers for value from the trustees. Here the defendants were certainly not the trustees; they were purchasers for value from the trustees.

I do not deem it material to consider whether the legal title of the defendants is to be attributed to the conveyance made to them by the parish officers of the two parishes, or to the fine and non-claim. The defendants certainly acquired the legal estate, and they were certainly purchasers from the trustees for a valuable consideration.

It was, indeed, argued at your Lordships’ bar that the parish officers from whom the appellants purchased were not really the trustees, and, consequently, that the appellants were not purchasers for value within the true intent and meaning of the twenty-fifth section. But this is a mere fallacy. The parish officers were, in fact, the trustees; for they were the persons in legal possession,

not for the benefit of themselves, but for the benefit of the charity ;
 and they sold to the appellants for value, and made to
 *212 * them a good legal title. The defendants were thus clearly brought within the express words of the twenty-fifth section.

On these grounds, I think that the information ought to have been dismissed, my reasons to sum them up being shortly these : The real plaintiffs are the poor of the two parishes. They are "a class of persons" within the first section of the statute. They are mere *cestui que trusts*, for the law recognises no rights except legal and equitable. A suit, by information of the Attorney-General, is in truth a suit by them. They cannot sue except within twenty years, unless the suit is by them as *cestui que trusts* against their trustee. This is not such a suit, because the president and scholars of the college are not trustees, but purchasers for value from the trustees.

LORD WENSLEYDALE. — In this case two questions arise for your Lordships' consideration. The first, whether the appellants, the defendants in the Court below, acquired a good title, at law and in equity, to the strip of land which they purchased in 1790 from the parishes of St. Olave and St. John, Horsleydown, for a rent charge of 15*l.* a year for ever. The second, whether the Attorney-General, suing on behalf of those parishes, is barred by Statute 3 & 4 Wm. 4, c. 27, from recovering the land in question.

The Master of the Rolls, before whom the cause was heard, decided on both these points against the appellants. I agree with that very learned Judge on the first question, but not on the second, and think, after full consideration, that your Lordships ought to reverse his decree, on the ground that the Attorney-General, suing, as in this case, for a charity, is barred by the Statute of Limitations.

It is not necessary to say much on the first point. It does not appear in whom the title to the fee simple of the
 *213 * land was vested at the time the Act of the 6 Geo. 2 was passed. That Act deals with land which had, before the making of the Act, been given and granted to, and appropriated and applied for, the service and benefit of the parish of St. Olave in general, but it does not recognise a title in any one: it gives a statutory title to the rector or senior church-warden, with the con-

sent of the vestry, to make leases of the lands settled for charitable purposes, but no more ; it gives no power, under any circumstances, to convey the lands ; and though, after a possession of more than sixty years, every reasonable presumption should be made to attribute that possession to a legal title, I do not think it ought to be done in this case. Where the statute empowers the conveying parties in the feoffment of 3d March, 1790, to lease only, we cannot possibly presume that they already had any greater power. The consent of the vestry to the actual conveyance of the land might, I think, be presumed, but not a legal title to convey in fee.

It becomes unnecessary therefore to consider whether a trustee in fee for charitable purposes could sell or convey a fee to a purchaser. If he can, it must be where there is a presumption from the nature of the trust that the land was originally conveyed with a power to dispose of it in the most beneficial way for the charity, and not merely to apply the rents and profits to its use.

The other question, which is attended with more difficulty, and is a very important one, is whether the Statute of Limitations, 3 & 4 Wm. 4, c. 27, applies to a charitable trust, and bars the Attorney-General, representing the Crown as *parens patriæ*, and suing on behalf of the objects of the trust, if the statutable time has elapsed. There is no doubt that none of the previous statutes of limitation, in terms, barred equitable rights, nor can there * be * 214 any doubt that Courts of equity always held that the terms prescribed for binding legal rights also bound equitable rights, except as between a *cestui que trust*, and a trustee in the case of express and charitable trusts, where there was no limit of time. The Statute of 3 & 4 Wm. 4, c. 27, undoubtedly meant to fix a limit to all equitable rights, according to the natural and ordinary construction of the words, and it applies to all persons claiming any land in equity. By the interpretation clause (section 1), the word "person" extends to a class of persons, as well as individuals, and under that denomination all the poor of the parish for the time being, who certainly have an interest in the application of the rents and profits of the land to the purposes of the charity, seem to me to be included ; so also the rectors and church-wardens of the parishes, who have the power over the immediate distribution of those rents and profits to the poor recipients. I do not think it necessary to inquire whether some of those several classes of per-

sons could, for themselves and the rest, and without the Attorney-General, file a bill against the defendants, to have the rents and profits distributed to the charitable uses to which they were originally destined, or whether the Attorney-General was a necessary party to the suit ; for if he was, it seems to me clear that he is only an instrument to enforce the rights of those who are entitled to the benefits of the charity, and stands in the same situation as they do with respect to those rights ; and if the claimants on whose behalf he is suing are barred, he must also be barred. He has no independent title of his own ; he must succeed or fail as they are entitled to succeed or fail ; and if the Statute of Limitations is a bar to them, it is a bar to the Attorney-General.

I think, therefore, that the twenty-fourth section of the Act
* 215 is a * bar to all classes entitled to sue, and therefore to the

Attorney-General (suing as he does here), by reason of more than twenty years having elapsed since they had been in possession of the rents and profits of the charity estate. If they had had the legal interest in the land, their right of entry or action would have accrued in the year 1790, and would have been long ago barred.

This subject was under the consideration of Lord St. Leonards when Lord Chancellor of Ireland, in several cases cited at your Lordships' bar, and he finally pronounced his opinion in the case of *The Commissioners of Charitable Donations v. Wybrants*,¹ that the 24th section of the statute barred charitable trusts unless the 25th section took the particular case out of its operation. I entirely concur in that opinion, and have reason to believe, from personal communication, that his Lordship has no doubt as to the propriety of that decision.

It remains for your Lordships to consider whether the 25th section applies to this case, and continues the right of the *cestui que trusts* to the time of filing this information in their behalf. The 25th section provides [his Lordship read it.] This section is certainly not very happily expressed ; but I suppose it means — indeed that was admitted at the bar — that the remedy of the *cestui que trust* for an abuse of an express trust vested in the trustee continues against him, and those claiming under him, though the estate is conveyed away, and is not barred by the expiration of the statutable period as against him, though as to the purchaser

¹ 2 Jones & L. 182.

from him, for a valuable consideration, the right to sue begins from the date of the conveyance to the purchaser, and therefore is barred in ordinary cases by the expiration of twenty years from that time, and, where disabilities * occur, by the expi- * 216 ration of the longer period allowed in such cases. It seems to me that under this section the Attorney-General, suing on behalf of the objects of this charity, is barred by the expiration of twenty years from the date of the conveyance to the appellants.

If the land is vested in this case in any trustee upon an express trust, as it probably is, the appellants either claim under that trustee, or they do not. If they do, it must be by virtue of the conveyance of 3d March, 1790, for that is the only conveyance to them, and it is for a valuable consideration, and then the lapse of twenty years from that day is in that case a bar to the suit. If they do not, the general rule in the 24th section applies, and the Attorney-General is equally barred by the lapse of twenty years from the date of possession, the statute making it equally a bar whether it is with or without notice of the trust.

The remedy against the trustees for a breach of trust, if these trustees can be discovered, is preserved against them, and those claiming under them without valuable consideration, if there be any.

The sole question in this case, therefore, is whether the Attorney-General, suing on behalf of the *cestui que trust*, is wholly exempt from the operation of the statute. If he is, it must be by inadvertence; for it is, I think, obvious that the framer of the statute had in view every claim, both legal and equitable, to real property, and meant to establish a general rule for the great object of quieting titles, and giving security to long and quiet possession. But, in my opinion, for the reasons before given, the Attorney-General has no independent title; he is only an instrument to obtain justice for those really interested; and if they have lost their claim by lapse of time, his, which is in part theirs, is also lost.

* I therefore concur with my noble and learned friend in * 217 advising your Lordships to reverse the decree of the Master of the Rolls.

Decree reversed, and cause remitted to the Court of Chancery, with a declaration.

Lords' Journals, 13th June, 1857.

WIGHTWICK v. LORD.

1857. February 27 ; March 2, 3 ; June 13.

STUBBS WIGHTWICK, *Appellant*.

LUCY LORD, *Respondent*.

Will. Residue. Life Charge. Executor. Trustee. Value.

A person having a charge for life on residue, has, to the extent of that charge, the rights of a residuary legatee, and is entitled to have the residue ascertained and secured within, if possible, one year after the death of the testator. It is the duty of the executor to do all in his power to effect that object.

In a case in which the will gave no specific directions as to the payment of debts, the executor, who was also the ultimate residuary legatee, having taken on himself (after the trustees named in the will had renounced), to administer the estate, did not ascertain and secure the residue at the end of the year, but worked part of the property (a coal mine) to a profit for several years, when it ceased to be of any value. On a bill, at the suit of the person having the charge on the residue, praying that the will might be established and accounts taken : —

Held (affirming a decretal order of the Lords Justices), that the executor was not, after assuming to act as a trustee, entitled to postpone the sale of the property to the prejudice of the person having the charge on the residue ; that, having postponed it, he was chargeable with the value of the mine at the end of a year from the testator's death, with interest thereon, and that that value must be calculated as constituted of the aggregate of the annual profits derived from the mine in all the subsequent years, till it became unproductive, such annual profits to be treated as deferred payments.

THIS was an appeal against two decretal orders of the Court of Chancery.

* 218 * The bill was filed by the respondent, Mrs. Lord, on the 7th of February, 1842, against the appellant, Mr. Wightwick, she being the daughter, and he the son of a gentleman named Thomas Devey Wightwick, who died on the 25th of March, 1828, having, on the 4th of that month, made his will, duly executed and attested, for passing real estate.

That will, so far as it is material, was as follows : The testator, after describing himself as “ heretofore of Bishbury, in the county of Stafford, but now residing at Birmingham,” gave to his son, Stubbs Wightwick, and his heirs for ever, a farm at Little Bloxwick, in the county of Stafford, which farm the testator estimated would produce for his son an income of 200*l.* a year. The will

then proceeded thus: "Also I give, devise, and bequeath unto my friends, John Fryer of Kingslow, in the county of Salop, gentleman, and unto William Tarratt the younger, of Wolverhampton, in the same county of Stafford, merchant, and to their heirs, executors, and administrators, all and singular my real and personal estate and effects of what nature or kind soever (save the settled estate as aforesaid), and wheresoever the same may be, to hold to them and the survivor of them, and the heirs, executors, and administrators of the survivors of them, upon the special trust and confidence that they the said John Fryer and William Tarratt, or the survivor of them, or the heirs, executors, or administrators of such survivor, do and shall, at some convenient and proper period, with the approbation of my said son, Stubbs Wightwick, absolutely sell and dispose of all and singular my said real and personal estates and effects, and after converting the same into money, stand possessed thereof for the purposes in this my will, or in any codicil hereafter to be by me executed, named, or to be named, that is to say, by the ways and means aforesaid, * or by mortgage thereof, or out of the rents and proceeds, * 219 if more convenient, raise the sum of 1000*l.*, and place the same out at interest, or invest it in the funds for the benefit of my granddaughter, Cecilia Lord, as hereinafter mentioned, and subject to the said sum of 1000*l.* to the use of my said granddaughter, upon trust, that my said trustees, and the survivor of them, and the heirs, executors, and administrators of such survivor, do stand seised and possessed of my said real and personal estate, for the purpose of raising and paying, in the next place, one annuity or yearly sum of 30*l.* per annum unto my housekeeper, Ann Beach, as a compensation for her care and attention to me in my various illnesses in my decline of life." "And, subject as aforesaid, for the purpose of raising and paying to my daughter, Lucy Lord, such an annuity or yearly sum for and during the term of her natural life as shall be 200*l.* a year over and besides one half share of the yearly income and produce of my real and personal estates (exclusive of the settled estate so hereinbefore limited to my son), my intention being that my said daughter shall have and enjoy an equal yearly income with my son during the term of her natural life, choosing to reckon (perhaps a little over done), the estate I have hereinbefore limited to him in fee, and which was his late mother's jointure, at 200*l.* a year. And it is my wish and desire

that the said annuity to my daughter be paid to her quarterly by equal quarterly payments," and not to be subject to the control of her husband. "Provided, nevertheless, that it is my wish and intention that my said daughter's annuity shall in no case exceed the sum of 600*l.* per annum. And that any annual overplus in produce of my real and personal estates so given and devised to my said trustees, after payment of 600*l.* a year to my

* 220 daughter and 400*l.* a year to my son, * shall go and be paid to my said son. I wish it to be understood by my said trustees that what I call interest and produce of my personal estate is not the income derived from the mines, but the profit arising after laying by and deducting thereout at least 10 per cent. per annum, to reimburse and pay back the capital expended in the plants and necessary wear and tear. And my mind and will further is, that the interest of the 1000*l.* so hereinbefore given to my said trustees for the benefit of my granddaughter, shall be applied by them in the maintenance of my said granddaughter until her age of twenty-one years, or day of marriage, which shall first happen, when the said sum of 1000*l.* shall be paid to her, for her absolute benefit and disposal, and subject to the raising the said sum of 1000*l.* for the benefit of my said granddaughter, to the said annuity of 80*l.* per annum to my said housekeeper, and said annuity, so not to exceed 600*l.* per annum, to my said daughter, I do hereby give, devise, bequeath, direct, limit, and appoint all my real and personal estate and effects whatsoever and wheresoever, unto my said son, Stubbs Wightwick, his heirs, executors, administrators, and assigns, to hold to him my said son, Stubbs Wightwick, his heirs, executors, administrators, and assigns for ever, and to and for no other use, trust, intent, or purpose whatsoever. And I beg leave to state to my said trustees, that although I have apparently placed a great burthen on their shoulders, yet it must be obvious to them, that my son, on satisfactorily securing, out of any specific parts of my property, my granddaughter's, daughter's, and housekeeper's respective monies and annuities, he may be let into the actual possession and management of the whole of my property, without throwing any particular trouble on my said trustees. And I do hereby appoint my said son, Stubbs

* 221 Wightwick, * and the said executors of this my last will, hereby revoking all former and other wills and codicils by me heretofore made."

The testator died on the 25th of March, 1828, three weeks after the date of his will.

The testator was, at his decease, seised in fee of a real estate called the Great Bloxwich estate, subject to a mortgage thereon for 6000*l.*; he was also possessed of a leasehold colliery called the Tividale Colliery, which he was engaged in working up to the time of his decease; he was also possessed of several canal shares and of some other personal estate. The colliery and canal shares were subject to several mortgages created by the testator, for sums amounting in all to 8182*l.*, and besides his mortgage debts the testator was indebted in various accounts at his decease in a sum of between 7000*l.* and 8000*l.*

Shortly after the testator's death, his son, the appellant alone proved the will, and entered on and took possession of the real and personal estate. The two other persons named as executors and trustees duly renounced probate and never in any manner interfered in the testator's affairs.

The bill, after stating these facts, went on to say that after the testator's death, the appellant continued to work the Tividale Colliery, and thereby realized large profits, and that he had from time to time paid to the respondent various sums on account of her annuity, but that a large balance was still due to her, and it prayed the usual accounts of the testator's real and personal estate; that the clear residuary estate might be ascertained; that the amount of annuity justly payable to the respondent might be ascertained and secured, and if the payments theretofore made to her should be found to be less than she was entitled to receive, then that the appellant might be ordered to pay to her the balance found due.

* The appellant, by his answer, alleged that if he had * 222 sold the colliery soon after the testator's death, it would have fetched very little, and admitted the working of the colliery, contending that by the provisions of the will, the testator intended him to be invested with an absolute discretion to sell or to work the mine; and that by his exertions therein he had been enabled to pay the respondent the 400*l.* a year, which made up her whole annuity to 600*l.* a year. The payment of such a sum she denied, and that formed a matter of inquiry on taking the account.

An interlocutory order was made, directing certain payments to be made of a sum taken as arrears, and likewise of the 400*l.* a

year, by the appellant to the respondent, without prejudice to any question. Witnesses were examined, and the cause came on for hearing before the late Vice-Chancellor of England, on the 18th day of March, 1844, when his Honour directed the usual accounts to be taken, and he continued the former interlocutory direction as to the 400*l.* a year without prejudice.

The Master made his report, dated the 1st of June, 1850, to which exceptions were taken, some of which were allowed; and the Master made a further report, dated the 12th of November, 1852, reviewing his former report on the points as to which the exceptions had been allowed.

The cause was then heard on these reports for further directions by Vice-Chancellor Kindersley, and he, by his decretal order, dated the 7th of May, 1853, directed certain other inquiries to be made with the view of ascertaining what ought to be considered the clear residue of the testator's estate applicable to the payment of the respondent's annuity, and he reserved further directions till those inquiries should have been made.

Both parties were dissatisfied with that order, and each presented a petition of appeal; the cause was accordingly * 223 * heard by the Lords Justices, who made an order, dated the 28th of January, 1854 (the important parts of which are fully stated in the judgment of the Lord Chancellor, see *post*, p. 229 *et seq.*), varying that which had been made by the Vice-Chancellor. Against both orders the appellant appealed to this House.

The Attorney-General (Sir R. Bethell) and Mr. Welford for the appellant. — The judgment here is entirely erroneous. The respondent might have required that the mine should be sold to secure her annuity (for except as to the mines the estate of the testator was insolvent), but if she did, she lost her chance of getting the 400*l.* a year, which could only be obtained by working the mine. She allowed the latter course to be taken as being more for her benefit. [THE LORD CHANCELLOR. — The fact of her assent to the appellant's retaining and working the colliery is denied.] She knew it, for she was for some time living in the appellant's house, and must be taken to have assented. She cannot therefore now demand to be treated in the same manner as if she had required the mine to be sold upon the death of the tes-

tator. Yet the decree has given her this advantage. This is not the case of a trustee engaging the trust property in an adventure without the consent of the *cestui que trust*. Had it been so, it is admitted that she might have claimed the benefit of the adventure without incurring the liability to loss. But it is the reverse. Both parties were *sui juris*. They in fact agreed to supersede the will.

But if the will is to be referred to, what was meant by the direction of the testator with reference to the ten per cent. The testator calls that his capital, and that would be a portion of the property which was liable to the purposes of the will. Suppose the mine to produce 2000*l.* a year. * There must be * 224 deducted from that sum, first the 200*l.* annuity; then the ten per cent.; then the 400*l.* for the respondent; then the 400*l.* for the appellant; and it is clear that the residue became his absolute property.

The ordinary rule, that perishable or diminishing property in a case like this should be sold, and the produce invested in consols, *Howe v. Dartmouth*,¹ does not apply here, because of the mode of dealing with the property which the parties must be taken to have agreed on. But if it is insisted on that the respondent did not agree to that, though undoubtedly she did not object to it, all that she can now require is, that the ten per cent. shall be invested as directed by the will, and interest paid upon it as capital. The mine could not be sold without the consent of the appellant; that was in fact giving him power to sell, or to refuse to sell it, and consequently the testator must have contemplated the appellant carrying on the business of the colliery. If so, how was the produce of that business to be dealt with? The sum of ten per cent. was first to be deducted and set apart, and treated as if originally part of the personal estate, and then, if the produce amounted to a certain sum, the daughter was to have 400*l.* a year, making her whole income 600*l.* a year, and the son was to take all the rest. The error of the Lords Justices was in not taking notice of this ownership of the mine thus in substance vested in the son. The coal mine was worked out. When that event happened, the annuity of 400*l.* ceased, and the respondent became entitled only to the 200*l.* as long as there was other property thereto applicable. The clear residue, augmented by the ten per cent., is the property

¹ 7 Ves. 137.

which is now applicable to it. The appellant was much in advance on account of the debts, and ought to be allowed interest on
 * 225 what he had * paid in respect of them, on the same principle as he has been made to pay interest on balances which he did not invest. The respondent here is not a creditor, but an annuitant deriving, as the appellant does, rights under the will. He was not a delinquent trustee, and ought not so to be treated. If the colliery was under the will a part of the general personal estate, the appellant ought only to be charged, in respect of it, with such a sum of money as it would have produced if it had been converted into money at the end of one year next after the death of the testator, and having worked it at great personal trouble, he ought to be allowed in the account the expenses properly incurred by him. And the account as to the canal shares ought to be taken in the same manner.

Mr. Rolt and Mr. Chapman Barber for the respondent. — There was no special direction in the will as to the payment of debts, and therefore as between the appellant and respondent the whole of the personal estate, as it stood at the testator's death, was the primary fund liable to them. That estate ought to have been got in and converted into money. As the appellant elected, instead of doing this, to retain the Tividale Collieries and the canal shares, he must be treated in respect of them as a trustee, and be held liable to account for all the profits derived from them. The rule must be strictly applied against him, since being only executor and beneficiary, he has thought fit to act as trustee. There is not any evidence to show that the respondent in any way agreed to release the appellant from his duty thus cast on him by the will, and by the principles of law applicable to it. Where personal estate is given to one man for life, remainder to another, if that estate is perishable, as, for instance, if it consists of long annuities,
 * 226 it must be sold and converted into consols, in * order that both parties may enjoy an equally good estate. The mine was intended to be so enjoyed here, but it was not made a specific legacy to the son. Nor was there any power given to him to prevent the sale of it; indeed, it might have been sold though he had opposed it, for the debts were at all events to be provided for. The state of the assets imposed on the executors the imperative duty to sell the estate for that purpose, and no trust could arise until the

debts had been satisfied. Here the fault of the appellant has been that he has assumed powers which did not belong to him, and though only executor, has dealt with the property as a trustee, he must therefore submit to be charged as such for what he has so received.

The Attorney-General, in reply. — The trustees having disclaimed, the executor became the only person who could carry into effect the trusts of the will ; he must, therefore, be taken to have acted in that character by desire of the testator, and not wrongfully to have assumed it.

June 13.

THE LORD CHANCELLOR, after fully stating the case, said : The question for decision is, what were the duties which the appellant had to discharge towards the respondent ? Except so far as any different line of duty is enjoined or permitted by the will, that question is one of no difficulty. The respondent has the rights of a residuary legatee ; she is not indeed entitled to the residue, but she has a charge on the residue, and has therefore, to the extent at all events of that charge, a right to have the residue ascertained and secured.

A residuary legatee has a right to insist that, in the course of the first year after the testator's death, the executor shall, if it be possible, pay the debts, legacies, and * funeral and * 227 testamentary expenses, so that the clear residue may be ascertained and paid over to him, or if he has only a life interest in it, may be duly secured for the benefit of the persons successively entitled. In order to effect this object, it is the duty of the executor to sell the personal estate, or, at all events, so much of it as is required for the payment of debts, legacies, and funeral and testamentary expenses, and if from any cause it has been impossible to ascertain the clear residue at the end of the year, still it is from that date that the right of those entitled to life interests in it commences, and, therefore, when eventually the whole estate is realized, it becomes necessary to ascertain retrospectively what was the residue at the end of the year, attributing a due proportion of the sum realized after the end of the year to capital and a due proportion to interest.

In the case now before your Lordships, the executor did not realize the whole personal estate at the end of the year by selling

the canal shares and the mine, but, on the contrary, he retained the canal shares and continued to work the mine as his father had done before him; and the first question is, whether, as between him and the respondent, this was authorised by the will, for, if not authorised by the will it was clearly a course of dealing with the property not justified by the ordinary rules of the Court of Chancery. I think the will gave no such authority.

If, immediately after the testator's death, the respondent had filed a bill for the purpose of having the estate duly administered, it is certain that the Court of Chancery would have directed the personal estate to be in the first instance applied in payment of the debts and funeral and testamentary expenses, in order that for the benefit of the respondent the clear residue might be ascertained

and secured, and this would necessarily have compelled a
* 228 sale * of the mine. It would have been no answer to the

respondent to say, that the testator had by implication authorised his son to work the mine. That authority did not and could not come into operation till the debts were paid and the personal estate had come into the hands of the trustees. If indeed the state of the assets had been such as to enable the executor to pay the debts and legacies without selling the mine, so that the mine might have formed part of the residue given to the trustees, then the argument of the appellant would, I think, have been good. In general, a person having a life interest in a residue has a right to call on the executor or trustees to convert into money all personal property of a perishable or speculative character, every thing, in short, not consisting of proper securities for money, so that it may be properly invested. But, of course, a testator may as between himself and his legatees modify that right by directing expressly or impliedly that any particular item of property shall not or need not be sold, and this direction has, I think, been given by this will as to the mine in question, but it is a direction not coming into operation till the property has reached the hands of the trustees, i. e. not till the debts had been previously paid.

It was attempted in argument to treat the case as if there had been a specific bequest of the mine. But here (even supposing that to present any solid ground of distinction) there is no gift of the mine specifically. What the testator gives to his trustees is all his real and personal estate upon certain trusts. The will contains no allusion to debts, but this is immaterial. The trusts on which

the trustees were to hold the personal property are trusts which could not be executed and would not come into existence until the debts had been previously paid, and the bequest to them must be read as if it had been a bequest * of "all my real * 229 and personal estate, after satisfying my debts and funeral and testamentary expenses."

The case must be dealt with in the same manner as if the bill had been filed, not by the respondent, but by the trustees, calling on the appellant, as the sole acting executor, to account and hand over to them the residue on the trusts of the will. On such a bill the appellant must have accounted for the whole profits of the mine, without reference to what his rights might have been if, in the due administration of the assets, the mine had ever come to the hands of the trustees on the trusts of the will.

Proceeding on these principles, I will consider in detail the several points of the order of the Lords Justices.

The order begins by declaring that it was the duty of the appellant, as executor, to apply the personal estate in payment of the debts and funeral and testamentary expenses of the testator, before applying any part of it upon the trusts of the will: "Their Lordships do order that an inquiry be made, what, at the end of one year next after the death of the said testator, was the amount of the said testator's personal estate which had then been realized, and the value of such parts thereof, including the said colliery and canal shares as had not then been realized. And their Lordships do declare that, in making the aforesaid inquiry, the said colliery ought to be valued at a sum equal to the aggregate amount of the net profits which were made therefrom in the year next after the death of the said testator, and of a sum equal to the value of the several and respective amounts of the net profits which were made therefrom in each year, from the termination of the said first year, up to and including the year 1840, reckoning such several and respective amounts as deferred payments, accruing due respectively at the termination of the several years in which the same were respectively realized."

* These directions and declarations, on the grounds which * 230 I have already stated, appear to me perfectly correct. The sums actually realized by the appellant in working the mine, all formed part of the personal estate, applicable first to pay the debts, and then to make up the residue given to the trustees, and on

which the trusts were to operate ; but as the great bulk of these sums did not come to the hands of the appellant till many years after the time at which the residue was to be ascertained, justice demands that when we are inquiring, retrospectively, what ought to be considered as the amount of the residue at that time, namely, the 25th of March, 1829, being one year after the testator's death, due allowance should be made for the necessary delay before they were actually received by the executor, just as if a part of the assets had consisted of a bond for securing principal sums of money payable by distant instalments. If any hardship is occasioned to the appellant by this mode of calculation, it is a hardship which he has brought on himself by not at once realizing the assets. But, in truth, I do not think that it will press unduly on him. It is only made in order to ascertain how much of the money received by him is to be attributed to principal, and how much to interest. All the sums in question came to his hands, and formed part of the general personal estate. The inquiry is only made for the purpose of deciding what, in respect of the larger receipts of subsequent years, ought to be considered as an equivalent receipt on the 25th of March, 1829, in order that, as he is liable for interest on the whole residue as from that day, he may not be unduly charged with interest on sums before he was fairly chargeable with receipt of the principal on which the interest is to be calculated. If the residue had been given absolutely, no such inquiry or calculation would have been necessary. All the sums, as they were received (assuming, of course, that all

* 231 prior * charges had been satisfied), would have belonged, and might at once have been handed over to the residuary legatee ; the postponement of payment would not then have affected the right of others. But when an executor, bound to pay interest on the residue to a tenant for life from a given day, omits to realize that residue till several years have elapsed, it is obvious that he would be greatly prejudicing the interests of those for whom he is acting, unless by some means the tenant for life is enabled to enjoy his income from the day when his right commenced ; and I see no mode in which this object can be effected, except that acted upon by the Lords Justices in this case.

The same principle has been adopted with respect to the canal shares ; and this part of the order properly concludes by declaring that " the personal estate of the testator, which ought to have been

held upon the trusts declared by the will, consists of what, upon the making of the said inquiry, shall be found to be the amounts and value of the testator's personal estate and effects, realized and unrealized as aforesaid, after deducting therefrom the amount of the testator's funeral and testamentary expenses and debts, and of any interest which accrued upon any of the said debts in the year next after the death of the testator."

The order of the Lords Justices next proceeds to define exactly what is the income to which the respondent is and has been entitled. The capital to produce that income is stated to consist of the real estate devised to the trustees, and of the sum which, according to the inquiries previously directed, shall be ascertained to have been the amount of the clear residue of the personal estate on the 25th of March, 1829, on which sum the appellant is declared to be chargeable with interest at four per cent.

During the first year after the testator's decease the income applicable to the trusts of the will consisted solely of the rents and profits of the real estate. After the end * of that year * 232 it consisted of those rents and profits, and also of the interest with which the appellant is chargeable on the residue. This is all properly declared by the order. During that first year the respondent was entitled to nothing but her annuity of 200*l.*, and the order therefore declares that during that year the rents and profits of the real estate, after keeping down the interest on the legacy of 1000*l.*, and paying Mrs. Beach her annuity (these having been charges prior in order to that of the respondent), ought to have been applied in satisfying the respondent her annuity of 200*l.* so far as they would go; and as that annuity was a general charge on the testator's whole estate, any deficiency not satisfied by the rents and profits, is properly declared to be a charge on the corpus of the whole real and personal estate, and therefore to be deducted from those funds rateably. All this is perfectly just.

There is then an inquiry directed as to whether any portion of the Bloxwich estate has been sold; why that was directed I do not know, but no complaint has been made of that part of the order.

The order then, fourthly, directs an inquiry, what, having regard to the preceding declarations, has been in every year since the testator's death, the income applicable to the respondent's demand in respect of her annuity, and of her interest in the surplus, and what she ought in every year to have received, and what if any-

thing is now due to her, having regard to what she has already received.

The decree finally declares, that the appellant was not entitled to any costs of the suit up to the time of the appeal to the Lords Justices, and it declares that the respondent's costs, and the costs of all parties to the two petitions of appeal ought to be paid out of the capital of the whole trust fund, real as well as personal, and it gives directions for taxing the same. This was, I think, quite

right. The appellant had made the suit necessary by his * 233 refusing to * account on the principle on which it turns out

he was bound to account; and I must observe that, in his answer, he not only refuses to recognise the respondent's demand, but he even insists on his being still a creditor on the estate for the mortgage debts which he had paid off. This contention strikingly shows the unsoundness of the principles on which he has acted in administering the estate. He has treated the income of the perishable part of the assets until the principal was exhausted, as income of the general residuary estate, and kept back the debts as subsisting charges to be liquidated exclusively out of the principal of the permanent assets. The result, if such a course could have been justified, would be enormously to benefit himself, as the residuary legatee, at the expense of those having rights prior to his own.

It was argued, indeed, that from the social relation which subsisted between the respondent and her brother, it must be considered that this mode of dealing with the assets was known to and sanctioned by her. But there is no evidence showing this to have been the fact. Looking to the relation which subsisted between those parties, it must be believed that the respondent relied on her brother to do what was right, and though it may be assumed that she knew he was working the mine, yet she certainly cannot be assumed to have sanctioned any course of dealing with the profits different from that to which according to the true construction of the will, and the general rules of equity, she was entitled. I think, therefore, that there was nothing like acquiescence to vary her rights.

On the whole, therefore, it appears to me that the appellant has no ground for his complaint, and, consequently, that his appeal ought to be dismissed with costs.

LORD WENSLEYDALE. — My Lords, I feel it quite unnecessary

* to occupy any portion of your Lordships' time in recapitulating the facts and proceedings in this case, which my noble and learned friend has stated with so much clearness and distinctness. * 234

I have carefully considered all the arguments urged in this case at your Lordships' bar, and not without a desire on my part to find some valid ground to mitigate the severity of the consequences of this decretal order to the appellant, who, I believe, has acted with perfect honesty and good faith throughout the whole transaction, and probably did the best that he could, in administering the estate; but the rules of law must prevail, and I am sorry to arrive at the conclusion that in this case those rules require us to confirm the decretal order of the Lords Justices. I will state very shortly the grounds of that opinion.

The question for us to decide is, whether the principle of the decretal order is right. I have had very great difficulty upon that question, but in the view I have been inclined to take of it, the sum to be paid by the appellant would be greater than what is due upon the principle which the Lords Justices have laid down, and therefore the appellant has really no reason to complain of the decree.

As between the creditors and the executor, there can be no doubt that the executor must take all reasonable means to collect the debts due to the testator, and must convert all the personal estate, whether goods, terms of years, or perishable property, into money, so as to pay the testator's debts in due course of law, and, after payment of debts, to discharge the legacies due by the will. He would be chargeable to creditors in an action for their debts, for what he could have sold the term and perishable chattel for, and if the action was delayed until profits were made by him out of the mines leased, then the profit up to the time of the action would be assets, according to the law laid * down in * 235 Comyns's Digest¹ and Rolle's Abridgment² and Williams on Executors.³ As between the executor and legatee, particular and residuary, the case is the same, unless the will authorises a different disposal of the assets.

The residuary legatee with whose case we have to deal has a right to insist that the executor, before the end of the first year

¹ Assets, C.

² Vol. 2 (5th ed.) p. 1508 et seq.

³ Executor, 920, § 8.

after the testator's death, ought, if possible, to convert all the assets into money, and pay the funeral and testamentary expenses, debts, and legacies, and hand over the clear residue to the residuary legatee, or, if the residue be bequeathed to one for life, to secure the capital in the 8l. per cent. consols for the benefit of those ultimately entitled, and if from any cause the assets cannot be sold, so as to effect this purpose, the right of the tenant for life will commence from that date.

This being unquestionably the rule with respect to an ordinary executor, and which ought *prima facie* to be observed by him, it was contended that in this case it was not applicable, because it was said that the respondent must be considered as having waived her strict right, and agreed instead, that the appellant should carry on the mine for their joint benefit, and pay her an annuity, and maintain her for a time in his house. This case is not stated in the answer, and is, for the first time, suggested at your Lordships' bar, and I am of opinion that there are no facts sufficient to warrant the supposition that what the appellant did was by virtue of such an arrangement with the respondent. The case will stand, therefore, exactly in the same position as if nothing had been done, and as if the ordinary legal course applicable to wills was to be followed.

* 236 * It was then said that there were provisions in the will which invested him with more discretion than an ordinary executor or trustee could have ; I think it clear that there were no such provisions. He had no right whatever, under any circumstances, to carry on the mine. The testator gave to his trustees, Fryer and Tarratt, the power to do so, and meant them to exercise that power, if the term came into their possession, for the Tividale Colliery fell under the description of mines in the will, and they are by the will directed to lay apart 10l. per cent. out of the profits of the mine to replace the capital, and then divide the profits, giving such part as should not exceed 600l. per annum altogether to his daughter, and the residue to his son. He gave no powers whatever to his son to interfere in the management of the mine. He gave the entire management of it to the named trustees only, who presumably would have conducted the business so as not to prefer the interest of one of the *cestui que trusts* to the other. It is obvious that if the appellant had been intrusted with the same power he would have had an interest to work out the

mine in the shortest time possible, for, in that case, the respondent would have her 600*l.* per annum only, but he would have the whole surplus which might greatly exceed a moiety. On the other hand, if the respondent, the daughter, had had a similar power of management, her interest would have been to work the mine as slowly as possible and extend the profit over a great number of years, so as never to earn more than the 600*l.* payable to her, and 400*l.* payable to the appellant, and thus to deprive him of the surplus. There was a good reason, therefore, to give the power of working to trustees independent of both parties.

It is, therefore, unquestionable that the appellant was * guilty of a *devastavit*, as executor, in carrying on the * 237 mine, and he was clearly guilty of a breach of duty as executor in working the mine as he did.

That being so, to what extent is he liable for that *devastavit*? I take it to be clear that in such a case the unpaid creditors and legatees (the present case is that of a legatee for life of an annuity not exceeding altogether 600*l.*) would have an option to charge him either with the value for which he might have sold the term at the end of the year after the testator's death, or with the profits which he had made by carrying on the mine before filing the bill.

This is the rule laid down by Sir Thomas Plumer in the case of *Heathcote v. Hulme*,¹ derived from prior authorities (*Burden v. Burden*²), cited on another point. Therefore the appellant might have been charged with the value at the end of the first year after the death of the testator, viz. 10,000*l.*, the then value of the term and interest thereon from the end of the year, or with the profits of the mine up to the filing of the bill, and with interest thereon on such part as he took out of the trade for himself, and either laid out at interest or might have done, and instead of so doing applied to his own use.

But if any part of those profits was invested in carrying on the concern, the respondent could not have interest on those, and also a share of the profits made by such subsequent employment. If the respondent had been a residuary legatee, the whole profits would have been to be calculated without a division annually; but as the respondent had a life interest only, an annuity partially payable out of those profits, it became necessary to calculate the

¹ 1 Jac. & W. 134.

² 1 Ves. & B. 170.

annual profits for all the by-gone years. But I cannot quite understand the principle on which the judgment has proceeded * 238 in fixing him with the whole value of the profits calculated at the end of each year, as if he had been capable of selling and had sold the mine at the end of the first year for a price equal to those profits considered as deferred payments, and also with interest on such price.

But if the calculation ordered is made as in this stage of the proceeding, it must be taken to be with due regard to the consideration of what are profits according to the explanation I have given, and if the appellant is charged with interest on the yearly profits received, I think the appellant will be a gainer by the mode which the Lords Justices have adopted instead of a loser. The amount of annual profits considered as deferred payments of the price, and interest thereon, from the end of the first year, will be less than the annual profits with the interest thereon from the year in which they were received. The appellant is not therefore injured by the decree. In that view of the case, I do not think I ought to advise your Lordships to reverse the decretal order of the Lords Justices.

Order of the Lords Justices affirmed, and appeal dismissed, with costs.

Lords' Journals, 13th June, 1857.

RIDGWAY v. WHARTON.

1856. February 25, 26, 28. 1857. June 15, 18, 26.

MARK WILLIAM RIDGWAY, *Appellant*.

REV. HENRY JAMES WHARTON, *Respondent*.

Agent. Contract. Delay. Specific Performance. Statute of Frauds.

If there is a signed paper, signed by an agent duly authorised thereto, which paper though agreeing to do something, leaves the subject matter of the agreement unexplained, but refers to another paper which contains the full particulars of

the explanation, the two may be connected together, so as to constitute a contract valid under the Statute of Frauds.¹

The contract so constituted by the act of A.'s duly authorised agent will be binding on A., though the second paper may have been sent by the agent to A.'s solicitor, to put it into form, provided * that the agent and the per- * 239 son with whom he was dealing, agreed that it should be sent for that purpose ; but not otherwise. The act of sending such a paper to a solicitor to have the matter reduced into form, affords generally cogent evidence that the parties do not intend to bind themselves till it is reduced into form.

Long delay may prevent a party to an agreement from calling for specific performance of it.

What are circumstances sufficient to establish an agent's authority, and a contract made in the exercise of it.

THIS was an appeal against a decision of Lord Chancellor Lord Cranworth, which had reversed a previous decision of Vice-Chancellor Stuart.

On the 5th December, 1852, the appellant filed his bill against the respondent, praying for specific performance of an agreement, and set forth the following case: The respondent was the owner in fee of certain premises at Sydenham, which were held by Messrs. Meux and Company, under a lease that would expire in 1852. In 1849 the appellant was the occupying tenant of these premises. Understanding that Messrs. Meux did not intend to renew their lease, he was desirous to secure to himself a new lease of these premises. In March, 1849, he had an interview with the respondent on the subject.

In May following, the appellant renewed his application, and then found that Meux and Company did not require a new lease, and the respondent said that he would see his agent, Mr. Crawter, who transacted his business for him ; that whatever Mr. Crawter did would be satisfactory to him ; and that the appellant was to treat with Mr. Crawter ; and the appellant then left with the understanding that Mr. Crawter, who was alleged to be the respondent's land agent and confidential adviser, was coming over to him to view the said premises.

The respondent afterwards sent to the appellant the following letter: "Mr. Wharton has this day seen his surveyor, Mr. Crawter, and sends Mr. Ridgway this note * to inform * 240

¹ *Fitzmaurice v. Bayley*, 9 H. L. Cas. 89 ; *Peek v. North Staffordshire Railway Company*, 10 H. L. Cas. 485 ; *Caton v. Caton*, Law Rep. 2 H. L. 135 ; *Xenos v. Wickham*, Law Rep. 2 H. L. 303.

him that Mr. Crawter has promised to go over to Sydenham on Saturday next, at about twelve o'clock, for the purpose of looking at 'The Greyhound,' and receiving any communication which Mr. Ridgway may be disposed to make to him. — Mitcham, Thursday evening, 17th May."

On the 19th May, 1849, Mr. Crawter came to Sydenham and surveyed and inspected "The Greyhound" and premises, and saw the appellant upon the subject of the property, the repairs and improvements, &c., and ascertained the appellant's views in regard to his becoming tenant of the premises.

On the 21st May, Mr. Crawter wrote a letter to the respondent, who on the 22d May sent an answer, in pursuance of the direction contained in which Mr. Crawter had an interview with Mr. Taylor, the manager of Meux and Company, and was then told that Meux and Company had no desire to renew their lease, or to that effect.

On the 7th June, 1849, Mr. Crawter made a report,¹ in writing, to the respondent as to the state of the property, and the terms upon which it would be expedient to offer a lease thereof to the appellant. This report, after stating (among other things) the condition and situation of the inn and premises, proceeds as follows: "The beer and porter trade attached to the concern is not great, about four puncheons a month, but the tenant has, by his industry and attention, obtained a considerable wine trade, and has now a fair stock by him; he also lets for hire horses and vehicles, and keeps for that purpose nine horses and three flies, and very naturally is desirous of obtaining an agreement for a lease, to commence at the expiration of Messrs. Meux and Company's interest in the premises, and offers on a sixty years' lease, 60*l.* a year clear rent, by which he would become the direct tenant of

* 241 the * owner, and be released from brewers, and free to deal with any one he pleased. This would be an advantage to him, and he offers, on having such agreement, to take down part of the house, consisting of two parlours and rooms over, and rebuild them, and in order to facilitate his object, he informs me he had negotiated with Messrs. Meux and Company for the residue of their term, for which they require 200*l.*, they giving up to him the improved rents receivable from their under tenants, and I have ascertained from their representative (Mr. Taylor) that they will

¹ This report was often referred to as Exhibit A.

not give up their interest without a consideration beyond being released from the dilapidations. Such being the case, and from the circumstance of the underletting by them being for the same term as their lease, which would prevent possession being now gained by the owner thereof, I see no particular inducement to the owner or advantage that would be derived by him in entering into such an agreement upon the terms proposed, but recommend the following terms to be offered to Mr. Ridgway, viz.: An agreement for a twenty-one years' lease to commence at the expiration of Messrs. Meux and Company's term,— Mr. Ridgway to lay out not less than 600*l.* in taking down and rebuilding that portion of the premises before alluded to, and sinking a well; such lease to contain covenants to uphold and keep the whole of the premises in substantial repair, and so deliver up same. The triangular piece of ground, No. 32, to be given up on his making terms with Messrs. Meux and Company, and not to be included in the twenty-one years' lease to him, but could then be offered for building purposes, having a frontage to the road, and eligible for that purpose. The rent to be 70*l.* a year; tenant to insure and pay all taxes. On these terms being proposed, it will probably lead to a negotiation by which a fair rent may be obtained, some arrangement made to *permanently improve the premises, *242 for which there is ample room. The land let to Mr. Price, Nos. 22, 23, 24, and 35, are accommodation park-like paddocks, ornamented with timber, and I believe he has been agreed with for a lease at the end of Meux's term. I beg to recommend, on such lease being prepared, that a plan of the lands, and the way thereto, be drawn thereon, the same having been materially altered by the construction of the railway, on the site of the old canal, or the land sold to the company."

The respondent afterwards called upon and consulted Crawter upon the subject of this report; and on that occasion authorised Crawter to see the appellant. Crawter accordingly wrote to the appellant on the 22d June, 1849, the following letter: "Sir,— I have been requested by the Rev. Mr. Wharton to see you with respect to your proposition as to the proposed new lease, and if you could be at Carshalton, King's Arms, on Tuesday next, between eleven and three o'clock, you will find me there any time between those hours, and I will take the papers, so that we may talk the matter over. If you cannot conveniently attend at Carshalton,

you will find me here on Wednesday morning, at ten o'clock, but I shall have more time at Carshalton to go into the matter."

The meeting took place at Carshalton, and Crawter conversed with the appellant upon the subject of the appellant's proposal, and discussed with him the terms upon which the lease should be granted, and read to him the material parts of the report, and, as the appellant alleges, agreed, on behalf of the respondent, to grant to the appellant a lease on the terms contained therein. A discussion likewise arose respecting the triangular piece of ground (No. 32), which was then occupied with the premises, and

which was by the report proposed to be omitted from the
 * 243 * lease, but which the appellant urged should form part of the premises to be demised; Crawter finally agreed that the same should be included in the proposed lease. The appellant, however, desired further time to deliberate before accepting the terms thus agreed to, and they parted upon the understanding that the appellant should write to Crawter, stating his acceptance of the terms, and that Crawter should procure a formal agreement to be then drawn up embodying the terms so agreed to by him.

The appellant not having written to Crawter accepting the terms, Crawter, on the 2d July, 1849, wrote to the appellant a letter in these terms: "Please to recollect you have not written to me with respect to the terms for the agreement as arranged when we met on Tuesday last at Carshalton. I cannot do any thing till you do write." On the 3d July, 1849, the appellant sent the following answer: "I beg to apologize for not writing to you before this, but it has been a subject of great consideration on my part, the shortness of the lease, the proposed outlay, and having worked very hard for the last fourteen years with so little profit or advantage, I certainly should feel very much obliged to you if you would allow me a longer term of lease, if not, I must submit to your terms, and will thank you to draw up the agreement at once as you proposed." On the 7th July, Crawter wrote thus to the respondent: "I beg to enclose copy of Mr. Ridgway's note in reply to the terms recommended in my report, which I communicated to him verbally. He is very anxious to have the triangular piece, containing 0a. 3r. 12p., included in the new lease; and as he agrees to lay out 600*l.* in building and sinking a well and the other terms, it is not an unreasonable request to have it included, and under all circumstances I recommend you to do so, and should

you approve, the agreement can be prepared in accordance with my report, but including the * 0a. 3r. 12p., and on * 244 hearing from you, I can (if it is your wish) furnish Mr. Gregson with the necessary particulars for the agreement."

The bill alleged that after receiving the last-mentioned letter and its enclosure, the respondent had an interview with Crawter, and at such interview approved of or acceded to the variation as to the triangular piece which was mentioned in the said last-mentioned letter; and he directed Crawter to send the particulars of the proposed lease to Mr. Gregson, the respondent's solicitor. The particulars so directed to be sent were those recommended in the report, but varied as to the triangular piece, as recommended in the last-mentioned letter. The respondent directed Mr. Crawter to send to Mr. Gregson the particulars as instructions for him to prepare a formal agreement between the appellant and respondent in accordance therewith.

Pursuant to such direction Crawter wrote and drew out the particulars of the intended lease (with the intended variations), and on the 30th July, 1849, he sent the same as instructions to Mr. Gregson, and such written instructions were in the words and figures, or to the effect following:—

"Memorandum¹ of terms for an agreement for a lease to be granted by the Rev. Mr. Wharton to Mr. Mark W. Ridgway. Premises situate at Sydenham, in the parish of Lewisham, Kent.

"No. on plan or deed of partition, 20. Grey-	a.	r.	p.
hound Inn, bowling green, garden, stabling,			
and meadow	3	1	11
"32. Triangular piece of Arable, formerly			
meadow	0	3	12
	4	0	23

* "An agreement for a twenty-one years' lease, to com- * 245
mence at the expiration of Messrs. Meux and Company's
term.

"Mr. Ridgway to lay out not less than 600*l.* in taking down and rebuilding part of 'The Greyhound,' viz. two parlours and rooms over, and in sinking a well.

"The lease to contain covenants to uphold and keep the whole of the premises in substantial repair, and to deliver up the same.

¹ This memorandum of the instructions was often referred to as Exhibit B.

"The rent 70*l.* clear. Tenant to insure and pay all taxes. N. B. — Mr. Ridgway is about to arrange with Messrs. Meux and Company for the remainder of their term, viz. three years at mid-summer, 1849, and therefore the outlay would be immediate on the agreement being entered into, the draft of which please send to Messrs. Crawter of Southampton Buildings."

The appellant not having received either from Crawter or from the respondent, the formal agreement for the intended lease, on the 27th August, 1849, sent to Crawter the following letter: "I have been expecting to receive from you the copy of the agreement; will you be kind enough to send it to me at your earliest convenience?" In reply, Crawter, 20th September, 1849, sent to the appellant the following letter: "Mr. Wharton's solicitor had instructions from me long since to prepare the agreement, and I fully expected he had done so, but my absence from town has prevented my seeing him, but will do so in a day or two. Mr. Taylor has been trying to learn from Mr. Wharton the terms arranged with you, but which neither he nor Messrs. Meux can have any thing to do with; and he seems to intimate that Messrs. Meux should have had the refusal of the premises, but I can remind Mr. Taylor that they had the offer of them, and he on their behalf declined. It strikes me, the less communication you have with Mr. T. the better."

* 246 *The bill alleged that the "instructions" mentioned in the last-mentioned letter were the written instructions, so, as aforesaid, given or sent by Mr. Crawter to Mr. Gregson, by the direction of the respondent; and the terms mentioned in the last-mentioned letter as "the terms arranged," were the terms contained or specified in the said written instructions.

Taylor, referred to in the last-mentioned letter, was the agent of Meux and Company; and in September or October, 1849, he endeavoured to obtain from the respondent, for Meux and Company, a renewal of their lease, although they had previously declined the offer of such renewal. The bill alleged that the respondent, on being applied to by Taylor for this purpose, replied that the house was irrevocably gone from them (meaning Messrs. Meux and Company), and that he had let it to some one else, and, in fact, he told Mr. Taylor that he had finally agreed with that other party; that Mr. Taylor afterwards ascertained from Crawter, that the appellant was the person to whom the house had been let, and with

whom the agreement had been made ; and in consequence recommended Meux and Company to offer to the appellant the remainder of their lease, and, in fact, Taylor himself offered it to the appellant, and in pursuance of the instructions which he gave to Meux and Company's solicitors, Messrs. Colley, Smith, Hunter, and Gwatkin, they on the 25th October, 1849, sent to the appellant a letter offering him the "opportunity of retaining the premises between this period and 1852." This proposal was not acted on.

Many interviews took place between Crawter and the appellant as to these premises, and the bill alleged that in no one of them was any doubt suggested as to the appellant having a valid agreement for a lease, but that on one of these occasions, when he was informed that the delay in the preparation of the agreement was attributable to the *respondent's solicitor, Crawter *247 suggested that the appellant should write to him a letter asking for the agreement, so that Crawter might show it to the respondent's solicitor. The appellant accordingly, on the 26th April, 1852, sent to Crawter the following letter : " I have the honour to apply to you for the agreement regarding this house which you were good enough to say should be forwarded to me. I trust you will not think me troublesome, but I am anxious on the subject, as the time is drawing nigh." In reply, Crawter, on the 30th April, sent the following letter : " ' Greyhound ' and premises. I find it is as far back as 1849 that I reported to the Rev. Mr. Wharton, since which changes have taken place, and he has now requested me to view the premises for the purpose of arranging the future letting, which I hope to do one day next week, and will then see you." In consequence of this letter the appellant's solicitor called upon Crawter, who then stated that the respondent did not regard the agreement of 1849 as binding or conclusive ; but if the appellant would write him a letter, he (Crawter) would communicate with the respondent, and ascertain what he was disposed to do, or to that effect.

On the 18th May, 1852, in accordance with this suggestion, the appellant sent to Crawter a letter, in which he recapitulated the circumstances as above set forth, and claimed performance of the agreement. In answer, Crawter received a letter from the respondent, in consequence of which he sent to the appellant the following letter, dated 22d May, 1852 : " In reply to your letter

of the 18th instant, I beg to inform you I have to-day seen the Rev. Mr. Wharton on it, and he desires me to say that he considers there is nothing decided as to the terms of letting you the premises from midsummer next; and he concluded long since, not *248 hearing any thing upon the subject, that the *transaction in 1849 had all blown over, and was at an end. Property at Sydenham has much improved since 1849, and other changes have taken place. Amongst others the water supply, and the removal about to take place of the Crystal Palace, &c. I am now instructed to give publicity to the letting, in order that Mr. Wharton may obtain the fair market value of the property, which is all he requires; and all that has previously transpired goes for nothing."

On the 28th May, Crawter sent the appellant a formal note of the terms at that time required for the premises. These terms were at once refused, and the performance of the arrangement of 1849 was insisted on. Possession of the premises was demanded for the respondent on the 24th June, 1852, and in November an action of ejectment was brought to recover possession of them. On the 5th December, 1852, the appellant filed his bill (which was afterwards amended), and after setting forth the above facts, prayed that the respondent might be decreed to grant to the appellant a lease pursuant to the agreement of 1849, and might be restrained from further proceedings with the ejectment.

The respondent, on the 28th January, 1853, put in his answer, and after stating (among other things) that Crawter was not his agent, and had no authority from him to act in that capacity in the matter, admitted the writing of the several letters therein mentioned, and set forth the letter of the 7th July, 1849, and stated that his solicitor had no other instructions from Crawter for preparing an agreement, except that he should prepare a draft agreement for his (the respondent's) consideration, and that he never intended to agree to any proposal for a lease till he had been advised by his solicitor as to the conditions and terms which ought to be inserted therein; and he thereby stated, in answer to *249 an interrogatory requiring him to set *forth the instructions, and the writing containing the instructions referred to in Crawter's letter of the 20th September, 1849, that Crawter had given to Gregson (the respondent's solicitor) as instructions the paper writing commencing with the words "Memorandum of

terms for an agreement for a lease," as above mentioned ; and he also stated that he proceeded throughout on the understanding that an arrangement would be made by the appellant with Messrs. Meux for the purchase of the remainder of their term in the premises, and that therefore the lease for twenty-one years would commence immediately ; and he also stated that he thought it probable he might have told Taylor, the agent for Meux and Company, that he was not in a situation to entertain a proposal to grant a new lease of the premises to Messrs. Meux until he had decided as to accepting or declining the terms proposed by the appellant ; and he also stated that he concluded from not having heard any thing of the matter for above two years that the appellant had been unable to arrange with Messrs. Meux for the purchase of the remainder of their term, and consequently knew that the respondent would not grant him a lease on the terms proposed in 1849.

Replication was filed, witnesses were examined on behalf of the appellant, but the respondent did not examine any witness on his behalf.

Some time in 1852 it appeared that the respondent obtained from Crawter a letter which the respondent had written to Crawter in 1849, on the subject of the lease proposed to be granted to the appellant. This letter the respondent destroyed. The respondent was called by the appellant as witness, and in the course of his examination gave the following account of the destruction of the letter : —

"I can give no reason for destroying the letter mentioned in 18th and 19th paragraphs of my answer, except that I * was not asked to return it. My impression is, that I think * 250 I wished to see it again, from thinking it related to the time at which the increased rent was to commence ; there being some difference between me and Mr. Crawter as to our understanding of what the plaintiff, Mr. Ridgway, meant upon that point. I think I destroyed this letter some time in the year 1852. I should think that it was returned to me for my examination a few days before I destroyed it. I cannot remember whether I read the letter before I destroyed it."

Cross examined. — "I certainly say that that letter contained nothing authorising Mr. Crawter to make any agreement or acknowledgment that any agreement had been made ; I never gave

Mr. Cawter any authority to make any agreement with the plaintiff on my behalf."

The cause was heard before Vice-Chancellor Stuart, who on the 19th July, 1853, made a decree for specific performance; which on appeal was, on the 22d December, 1853, reversed by the Lord Chancellor, and the appellant's bill ordered to be dismissed (3 De G., M. & G. 677).

The present appeal was then brought.

The case was twice argued; in 1856 by Mr. Roundell Palmer and Mr. Lewis for the appellant, and the Solicitor-General (Sir R. Bethell) and Mr. Bacon for the respondent; and again in 1857 by Mr. R. Palmer for the appellant, and the Solicitor-General (Sir R. Bethell) for the respondent. As the circumstances of the case were very fully discussed in the judgments, it has been deemed proper to give but an epitome of both arguments.

For the appellant it was contended: The questions here are, first, whether there was any contract at all? Secondly, whether the person who made it was sufficiently authorised thereto; or if not, whether what he did was afterwards recognised by the
 * 251 principal? Thirdly, whether * there was any objection, under the Statute of Frauds, to the appellant's right to a decree? And fourthly, whether such an objection was open to the defendant without having been expressly pleaded?

As to the first, it is submitted that the letter of Cawter of the 20th September, 1849, is sufficiently connected with the "instructions" given by Cawter to Gregson to constitute a binding and valid contract, for taken together they express the terms of the contract, and leave nothing further to be added.

Secondly, Cawter, the person who made this contract, had sufficient authority to make it. The appellant was directed to communicate with him as the respondent's man of business, and the communications made to him after he had made his report entitled him to conclude the agreement; and he so construed them, for he sent instructions to Gregson, the respondent's solicitor, to prepare the lease. Nothing was there left undetermined between the parties. The respondent himself had recognised the correctness of what Cawter did, and had declared to the agent of Messrs. Meux, that the house was irrevocably gone from them, and that he had let it to some one else. This showed that, in fact,

the authority of *Crawter* was fully recognised by Wharton, and that Wharton himself considered that *Crawter* had made a complete contract.

Thirdly, there is no objection here under the Statute of Frauds, *Tawney v. Crowther*.¹ The statute does not require that, in order to be an agreement, it should be formally put into writing, and signed, but that there shall be a signed memorandum of it. The letters here comply with that condition. There is here a fuller compliance with the statute than in *Western v. Russell*.² *Welford v. Beazely*³ shows that there need be no particu- * 252
lar form of words, or of signature. In *Owen v. Thomas*,⁴ a letter to a party's own attorney, stating the substance of the agreement, was held sufficient under the statute. *Morgan v. Holford*,⁵ *Fowle v. Freeman*,⁶ *Gibbins v. The Board of Management of the Northeastern Metropolitan Asylum*,⁷ were all cases where no complete and formal agreement had been signed, and yet it was held that a valid contract had been constituted. There was, however, a sufficient signature here according to the principles laid down in *Saunderson v. Jackson*.⁸ And, in *Jackson v. Lowe*,⁹ where there was a dispute about the quality of the sacks of flour delivered, a letter written by the attorney for the defendant was connected with one written by the plaintiff, and the two thus connected together were held to constitute a written contract within the Statute of Frauds. *Allen v. Bennet*¹⁰ is to the same effect. *Dobell v. Hutchinson*,¹¹ where the question was fully discussed, lays down the rule that two papers may be connected together so as to form one contract, if the paper which is signed refers to another paper which contains the terms of the contract. *Clinan v. Cooke*,¹² *Howard v. Braithwaite*,¹³ and *Beaufort v. Neeld*,¹⁴ all proceed on the principle that a man may not lightly disavow an agent on whose apparent authority he has allowed another party to deal.

Then comes the question, whether this defence is open to the party without pleading it. No one doubts that the Statute of Limitations must be pleaded; so must the * Statute of * 253

¹ 3 Brown, C. C. 161.

² 3 Ves. & B. 187.

³ 3 Atk. 503.

⁴ 3 Mylne & K. 353.

⁵ 1 Smale & G. 101.

⁶ 9 Ves. 351.

⁷ 11 Beav. 1.

⁸ 2 B. & P. 238.

⁹ 1 Bing. 9.

¹⁰ 3 Taunt. 169.

¹¹ 3 A. & E. 355.

¹² 1 Sch. & L. 22.

¹³ 1 Ves. & B. 202 - 209.

¹⁴ 12 Clark & F. 248.

Frauds. Both admit the existence of a document, and both prevent the remedy upon it. The answer here admits the whole of the facts, except that of Wharton giving authority to Cawter. If so, then the answer did not put the case on the mere legal insufficiency of the agreement, and the statute ought to be pleaded. There is certainly nothing in the books of pleading in equity that show such a defence can be set up without pleading it. In Mitford on Pleading¹ it is said, "The statute may be pleaded in bar of a suit to which the provisions of the Act apply," and then instances are given. Fonblanque on Equity² treats the matter in the same way. Lord Eldon suggests the same thing by his observations in *Cooth v. Jackson*,³ and *Skinner v. M'Douall*⁴ shows that where a party did not expressly claim the benefit of the statute he was not entitled to it. *Clinan v. Cooke*⁵ has no bearing on this point.

For the respondent it was argued, first, that there never was a completed agreement between these parties. Second. But, if there was any kind of concluded agreement, it was made through the medium of a person who was not authorised to make it. Third. If there was any such agreement, it could not be proved in evidence, because there was no writing signed by the defendant, or by any one lawfully authorised by him. Fourthly. This bill is an attempt to enforce an abandoned transaction, and that after an interval of time sufficient to show that the plaintiff had long since given up any intention to act on the agreement.

As to the first point. There is no document constituting an agreement and including the terms which the parties had * 254 finally determined on between themselves. Every thing * was left undecided. To the last the appellant postponed determining, because he said the terms were too high and the time too short. The letter of September, 1849, and the instructions to Gregson, even if connected together, do not constitute a complete agreement. The reference made by one paper to another must, for such a purpose, be perfectly clear, and the intention expressed in that which is to form the contract must be final. Sugden, "Vendors and Purchasers."⁶

¹ 3 ed. p. 215, 4 ed. p. 265.

² 5 ed. vol. 1, p. 183.

³ 6 Ves. 12.

⁴ 2 De G. & S. 265.

⁵ 1 Sch. & L. 22.

⁶ 10 ed. 171, 11 ed. 120.

As to authority, Cawter expressly denies that he had more authority than to communicate the terms of his report. That report was not communicated to Gregson for the purpose of preparing an agreement according to its tenor, but to enable Gregson to advise with the respondent upon it. There was no agreement signed, nor any made in substance so as to be signed. What Wharton said to Taylor cannot be relied on as recognising the authority of Cawter and the contract made by him; it was merely said to get rid of his importunity, and cannot be held to be binding on Wharton.

Here the transaction has been abandoned so long that equity will not now enforce the alleged agreement. *Southcombe v. The Bishop of Exeter*.¹ There the delay in asking for specific performance was from 17th July, 1842, to 30th August, 1843, and Vice-Chancellor Wigram thought that delay too great. In *Walker v. Jeffreys*,² the same learned Judge had previously dismissed a bill where there had been a delay of two years. In *Watson v. Reid*,³ where the bill had not been filed for above a year after a notice from the intended purchaser that he should abandon the contract, it was dismissed. In *Eads v. Williams*,⁴ * these de- *255
cisions were referred to, and recognised by the present Lord Chancellor.

As to the Statute of Frauds, the case of *Welford v. Beazely*⁵ merely shows that where, in the body of the deed, there is an express stipulation that A. will do a certain thing, the deed will be binding on A. for that purpose, though A. appears to sign it merely as a witness. Here there was no signature of the respondent in any character whatever. The rule of law is best stated in *Boydell v. Drummond*,⁶ where a signed book was not allowed to be connected with an unsigned printed prospectus, because such connection could only be established by parol evidence. *Clinan v. Cooke*⁷ followed the same principle, and *Dobell v. Hutchinson*⁸ laid down the express rule that where two papers were to be connected together by reference, the words of reference must be sufficient of themselves to identify the document. No doubt if the thing exists in one paper you may by evidence show that it corresponds with

¹ 6 Hare, 213.² 1 Hare, 341.³ 1 Russ. & M. 236.⁴ 4 De G., M. & G. 674.⁵ 3 Atk. 503.⁶ 11 East, 142.⁷ 1 Sch. & L. 22.⁸ 3 A. & E. 355.

the description of it contained in another; *Tawney v. Crowther*,¹ *Western v. Russell*;² but the two must be plainly and indisputably connected together.

Then as to pleading the statute. It is only necessary to be pleaded in one particular case, and that is where, by admitting the agreement in the answer, you release the plaintiff from producing any further testimony of it, and come under the necessity of protecting yourself from the effect of it by pleading that the agreement is not enforceable under the statute. *Wood v. Midgley*.³

* 256 * *Mr. R. Palmer*, in reply. — *Western v. Russell*,⁴ *Jackson v. Lowe*,⁵ and *Boydell v. Drummond*,⁶ do not show that the whole agreement to be enforced must be so put in writing as to exclude any necessity for parol evidence. If different writings refer to each other, they may be connected by parol evidence so as to make the agreement complete. All that is required is, that the connection between them should not be of a doubtful kind. It is not doubtful here.

There has been no delay such as to prevent a suit for the performance of the agreement, and whatever delay there was is attributable to the respondent and his agents.

June 26.

THE LORD CHANCELLOR, after fully stating the circumstances of the case, and the decision in the Court below, said: The ground upon which I proceeded was, that even assuming *Crawter* had authority to contract, and supposing that, in the exercise of that authority, he had entered into a written contract, still that was not a contract so entered into as to be binding within the Statute of Frauds, and that, consequently, upon that ground the Vice-Chancellor's decree was wrong. I will presently state what view I take of the former part of the case; but I wish to begin by stating that in my opinion on the point as to the Statute of Frauds, I came to a wrong conclusion, and I think it infinitely better to state that at once than to do that which would not be creditable to the Judge, and certainly would be extremely inconvenient to the public, to try to explain away and make out distinctions where

¹ 3 Brown, C. C. 161.

² 3 Ves. & B. 187.

³ 5 De G., M. & G. 41.

⁴ 3 Ves. & B. 187.

⁵ 1 Bing. 9.

⁶ 11 East, 142.

distinctions do not really exist. I have no hesitation * in saying, that upon looking at the case attentively, I * 257 think that I did not sufficiently advert to this fact, that the instructions which were sent to Mr. Gregson were written instructions ; and the authorities lead to this conclusion, that if there is an agreement to do something, not expressed on the face of the agreement signed, that something which is to be done being included in some other writing, parol evidence may be admitted to show what that writing is, so that the two taken together may constitute a binding agreement within the Statute of Frauds. For instance, I think that, supposing it had been made out distinctly that Wharton had said to Cawter, " I will be bound by any agreement you make for me," and that Cawter had then said, " I make an agreement that you shall grant a lease according to the terms that I have sent to Mr. Gregson," that would have been a good agreement, if signed by Cawter as his authorised agent, so as to bind Wharton, although the terms of the agreement did not appear upon the face of the instrument so signed.

That has been established in several cases that were referred to in the argument, and it is quite unnecessary for me to refer to them over again ; two of them are quite sufficient to illustrate the doctrine. One is the case of *Allen v. Bennet*,¹ in the Common Pleas, decided in the time of Lord Chief Justice Gibbs. There a traveller for a certain firm in London went down into the country in order to sell some of his employer's goods, and entered the terms of sale of the goods in the book of the shop-keeper, the buyer in the country, and afterwards the merchant in London, whose traveller had so entered and signed the terms in the book of the buyer, wrote a letter to the agent recognising and referring to that as being a contract ; * referring to it in such a * 258 manner that the two writings were considered as being united together, and in consequence the Court of Common Pleas held, that that was a sufficient signing to take the case out of the operation of the Statute of Frauds, not indeed of the section which we have now under consideration, but of the 17th section to which exactly the same principle would apply.

Then, my Lords, there was a case of *Dobell v. Hutchinson*,² which went exactly upon the same principle. There, the defendant having put up a thing for sale by auction, the plaintiff entered

¹ 3 Taunt. 169.

² 3 A. & E. 355.

into a written agreement signed by himself, to purchase it upon certain specified terms. It turned out that Hutchinson, the defendant, had not a title which authorised him to sell, and consequently, that he could not complete the sale ; but in the correspondence which took place afterwards, several letters referred to the terms which had been signed by Dobell, the plaintiff, as being the terms which were then subsisting between them, and the Court of Queen's Bench held that, parol evidence being given to show what the terms were to which Hutchinson referred in his letters, the two might be taken together, so as to bind Hutchinson, and to show that that was the written paper, signed by the plaintiff, to which he referred as being the terms of the contract.

Now adopting that principle in this case, I confess I think it quite clear that if there was authority given by the defendant to Cawter to agree to grant a lease, and if Cawter, in the exercise of that authority, entered into an agreement to grant a lease in the terms of the instructions which he gave to Gregson, parol evidence showing what those instructions were, and that they were written instructions, would be sufficient to take the case out of the Statute of Frauds. It is always, of course, a source of * 259 much * regret to fall, as I have fallen, into an error. I think that the cause of it was, that I did not sufficiently advert to the fact that those instructions were written instructions.

My Lords, I came to that conclusion in giving judgment in the Court below, and I pointed out that if the matter had rested upon the parol testimony of Cawter, Wharton, and Ridgway alone, I should have had extreme difficulty in coming to the conclusion that there was either authority or contract. In the view I then took of the case, it was not necessary for me to decide that, but I stated that the strong inclination of my opinion was that, coupling all the testimony together, there was enough to show that something had passed between Wharton and Taylor, the agent of Messrs. Meux and Company, sufficient to prove that there had been authority to contract. Of course that, so far as the plaintiff was concerned, was immaterial, because I was of opinion against the plaintiff on the other grounds.

When the case was argued before your Lordships last year, I came very strongly to that opinion ; and though I have been

wrong upon the point as to the Statute of Frauds, yet I think that if I had more maturely considered the other point, which, when the case was before me in the Court of Chancery, it was not necessary for me to consider, I should have come to an opposite conclusion to that at which I then arrived; for, upon looking at all the evidence, I think that the strong weight of evidence goes to show that there was neither authority nor contract. The case was then heard before my noble and learned friend on my left hand, and myself, and though I did not exactly communicate with him so as to know what were his views, from the observations which fell from him in the course of the argument, I rather inferred that that was also his opinion.

I was extremely unwilling to give a judgment that *should, to the parties at least, have the appearance, * 260 though your Lordships would not suppose it, of my seeming to be desirous, admitting myself wrong in one part of the case, to try to save myself from the effect of that error by finding against the plaintiff upon another point, and therefore, I was extremely anxious to have the matter reargued, when I might direct my attention particularly to that point (though I did not confine myself to it exclusively), for I had almost satisfied myself that upon the other point, as to the Statute of Frauds, I was wrong. I was consequently anxious to have the case reargued by one counsel on each side, and that has been done in the present session, and we have had the advantage of having the presence of more noble and learned lords than were present at the former argument. And, my Lords, having attended to this case with great anxiety, for fear I should, unknown to myself, endeavour to take a view which should be favourable to the result at which I had before arrived (though upon different grounds), after all that caution, I am bound to say that the conclusion at which I have arrived is that there is no sufficient evidence either of authority, or, if of authority, of contract.

My Lords, I think, in the first place, that it is not proved that Wharton gave to Crawter any authority to bind him (Wharton) to any thing. In examining this part of the case, we must consider ourselves as a jury, and as performing the same functions as if the matter had arisen upon a trial at *Nisi Prius*. I cannot listen to the suggestion, and I am sure that your Lordships will not, that upon this point there can be any difference between law and equity.

The question is one of fact. Supposing this to be an action brought by Ridgway for damages for breach of this contract, has he or has he not given evidence of a kind to satisfy a jury that any authority was given.

*261 *Now, in order to prove this authority, the plaintiff examined two witnesses, and they are witnesses quite competent to speak to the facts if they are honest witnesses; and they are not only competent, but they are the only persons who can speak to the point of authority, namely, first, the person who is alleged to have given the authority, and secondly, the person who is alleged to have received the authority. They are both examined, and they both positively deny that any authority was given such as is contended for by the plaintiff. Crawter says: "After I had sent in my report," that was at the end of May or the beginning of June, "the defendant called upon me. I do not remember the date. I think in June, he said, 'You may see Mr. Ridgway (the plaintiff) upon the recommendations in your report.' I remember nothing else in particular; this was the substance of what he said, perhaps not the precise words. In consequence of this, I wrote to the plaintiff, and he within a fortnight came over to me at Carshalton; I was there on another client's business. It was on the 26th of June; I keep a memorandum of the business of my clients." He looks at a diary, and says: "I have now looked at my diary, and there is no memorandum on the subject. I did not consider the business of seeing the plaintiff of importance. I have not my memorandum book here. I cannot say whether there is any entry with regard to the plaintiff's business on that day in that book. To the best of my recollection, I have not made any statement to the defendant or his solicitors as to whether there is an entry of this business on that day in that book, when I and the plaintiff met at Carshalton." That is what he says. Now, if the case rests upon that, of course there is no evidence whatever of authority; Crawter denies it.

*262 Then, my Lords, the defendant himself is examined, * and what he says is this: "I did not know that Mr. Crawter had sent any document or memorandum to Mr. Gregson until some time in the year 1852. I did not communicate to Crawter any thing about the triangular piece of land after receiving the letter of the 7th July, 1849. After receiving that letter, I think I

must have let Mr. Crawter know that he was at liberty to lay the whole particulars before Mr. Gregson ; I have not the least recollection that I did so."

These being the only two witnesses examined, if such an action had been brought in a Court of law, and the plaintiff had rested his case upon the evidence of these two witnesses, it is quite clear that upon the point of fact, the plaintiff must have been nonsuited. It is his business to prove that Crawter had authority, and the only witnesses whom he called are Crawter and Wharton, one of whom denies that he received, and the other that he gave, any authority. How can the plaintiff upon that evidence rely upon his having proved authority.

When the matter was previously before me, I expressed what I now express, that it was impossible to arrive at the conclusion that Crawter had authority ; but I was much struck with the evidence that was given by the other witness called by the plaintiff, namely, Taylor, the agent of Messrs. Meux and Company. Mr. Taylor says, that "he (Taylor) went on behalf of Messrs. Meux to ask for a lease from Wharton, but Wharton told him 'that he had finally agreed with that other party.' I was satisfied the house was finally disposed of; I understood from Mr. Wharton that the terms at which he had let the house were extravagantly high." Now, coupling that with the fact that Crawter had negotiated with the plaintiff, as if authorised by Wharton, I was very much struck with that as materially altering the view which the rest of the evidence, if * taken alone, would have induced me to * 263 form. I have given, however, the fullest attention to this evidence, and now for the first time I must make up my mind upon it, and in my opinion that evidence never could be held to counter-vail the absolute negative of authority given by Crawter and Wharton in their examination, because I think that it is so consistent with human nature that Mr. Wharton, understanding from Crawter that this negotiation had been going on, and being fully persuaded that it would end in a final agreement, does not enter into details with Taylor, but tells him, "I have finally agreed." That was in a certain sense perfectly true ; they were negotiating about it, and I dare say that Wharton had no doubt in his mind but that it would end in an agreement ; and the remark may be applied to this which is used by Lord Eldon in one case, namely, that these sorts of statements made to third parties are very little

to be relied upon, for they are very frequently made merely to get rid of the importunity of these persons.

The question therefore is, whether upon these three witnesses being called to sustain an action in a Court of law, jurymen would be justified in saying that there had been any authority given to Crawter? I am of opinion that they would not, and that being so, in my opinion, sitting as a Court of equity, it is not competent to us to come to a different conclusion.

In that state of things there is an end of the case; because, there being no authority, the question whether there was an agreement formally entered into or not is unimportant. But I must say that I was much struck by the consideration that if there was any authority, there really was nothing that could be considered as an agreement. I quite agree with the doctrine, as being a good doctrine, both in law and at equity, that if parties have entered

* 264 into an agreement, * they are not the less bound by that agreement because they say, we sent it to a solicitor to have it reduced into form; but when the parties negotiate and do not say so, the mere fact that they do send it to a solicitor to have the matter reduced into form, affords to my mind generally cogent evidence that they do not intend to bind themselves till it is reduced into form. That, however, is a question of fact which must depend upon the circumstances of each particular case.

There was a case much relied upon on that subject, the case of *Fowle v. Freeman*,¹ that appears to me to be correctly decided, and I think that is a decision which would have been come to, and ought to have been come to in a Court of law, as well as in a Court of equity. There the parties had been negotiating, Fowle for the purchase, and Freeman for the sale of a large estate, and finally, there having been some previous negotiations which did not end in an agreement, they met together on the 12th of March, 1803. Freeman then signed this document: "I agree to sell to Mr. Fowle my estate, tithes, and manor at Chute Lodge, together with the woods, trees and fixtures (except Cadley Cottage), for the sum of 27,000*l.* upon the following conditions." Then the conditions are all enumerated, and he signed the document, and then he added a letter to his solicitor desiring him to prepare a proper agreement for Mr. Fowle and himself to sign, and to deliver to the bearer an abstract of his title. That was a valid agreement

¹ 9 Ves. 351.

to all intents and purposes. They might well wish to have it in a more formal way, but the direction to the solicitor to hand over an abstract of the title, and his positively signing the agreement, make it perfectly clear that the parties meant that agreement to bind them, although the formal agreement * was signed * 265 afterwards. That was the conclusion at which Sir William Grant arrived, and at which I should myself have arrived.

My Lords, there was a previous case of which I cannot say the same, with all deference to the very high authority by whom the case was decided; I allude to the case of *Tawney v. Crowther*.¹ I do not hesitate to say that the conclusion, in point of fact, at which Lord Thurlow there arrived was wrong, and I think from what Lord Redesdale afterwards says of that case, that Lord Thurlow was not himself satisfied with it, but that he considered it a very doubtful case. That was a case in which the defendant Crowther was seised of a house called the White Hart Inn, in Benson, in the county of Oxford, which he was desirous of selling. Mr. Morell, an attorney at Oxford, was employed by the plaintiff to treat for the purchase of it. Morell agreed to give and Crowther agreed to take 1100*l.*, and it was agreed between them that the agreement should be reduced into writing in order to be signed; it was accordingly reduced into writing, but Crowther wishing to receive the rent due at Michaelmas, possession was not to be delivered till then, but the defendant declared that his word was as good as his bond, and that he should be in Oxford on Tuesday morning, and would then call on Morell and sign the agreement. He did not however call, and he would not sign the agreement. To the bill the defendant pleaded the Statute of Frauds, but Lord Thurlow there held, for reasons which I need not go into, that the Statute of Frauds did not apply, and that the case was taken out of the Statute of Frauds, from the circumstances to which he alluded. Then the bill was answered, and the case came on a second time, and is again reported in the same volume,² and then * the Lord Chancellor says: "The question turns on * 266 two points, 1st, as it stands under the Statute of Frauds; 2d, independently of the statute. And first as to the Statute of Frauds; it is an easy question taken by itself. A good deal of ingenious argument has been made use of to prove that the letter is insufficient to take it out of the Statute of Frauds. If the letter

¹ 3 Brown, C. C. 161.

² 3 Brown, C. C. 318.

contains the terms of the agreement, or if it refers to another paper which contains the terms, that is sufficient, for I am of opinion that if a letter refers so clearly to an agreement as to show what was meant by the parties, where the existence of the paper is proved by parol, that will take the case out of the statute." That is the ground on which I now advise your Lordships to act upon the question as to the Statute of Frauds here. Then Lord Thurlow says: "Then how is the fact? Crowther writes a letter referring to a paper in his own possession, and promises to perform; such a letter would be sufficient to draw them from the objection that the promise is not in writing. Then, independent of the statute, if a letter now will bind the party, before the statute a parol agreement would have been binding. The question is whether here is sufficient to raise a contract that will bind. If the letter cannot be referred to the agreement, or does not contain proper terms, I cannot treat it as out of the statute, but I confess, on what appears here, the papers do refer to that agreement, and contain a promise to perform it; the defendant did intend by the letter to raise a confidence that the agreement should be performed. If he had meant only to treat further, it would not have taken it out of the statute, being only *ad referendum*, but no doubt he meant to refer to the agreement which had been reduced to writing, and which he had carried away with him." The question is whether all the parties meant that to be a conclusive agreement.

* 267 * Now, my Lords, whether the parties meant that to be a concluded agreement was a question of fact, and in the case of *Clinan v. Cooke*,¹ which was referred to in the argument here, Lord Redesdale has some very pertinent remarks on the case of *Tawney v. Crowther*. He says: ²"There the agreement was prepared in writing, the defendant declined to sign it, but he wrote a letter which Lord Thurlow said he relied on as referring to the written paper containing the terms of the agreement, and he thought that letter was tantamount to signing the written agreement, which written agreement, by the by, was in the defendant's own hands. It is a misfortune that persons publishing reports of cases in equity do not take the trouble of looking into the decrees; in that case Lord Thurlow, though he pronounced that decree, yet he gave the defendant his costs provided he consented to deliver up

¹ 1 Sch. & L. 22.

² Page 33.

possession within a certain time ; his Lordship was diffident of his opinion, and intimated that he did so to secure against an appeal, the property being but small, and this shows that he did consider that as a doubtful case, otherwise it would be extraordinary that the defendant should have his costs where he was wrong. However, Mr. Brown has not taken any notice of that circumstance which I am sure was as I have stated it. I have often discussed that case, and I never could bring my mind to agree with Lord Thurlow's decision, for this reason : he considered the letter tantamount to a signing of the agreement. I thought the true meaning of it was, I will not bind myself, but you shall rely on my word. The case is not very accurately reported ; however, it appears to me strong in favour of the opinion I entertain in this case, supposing Lord Thurlow to be right."

* Now, my Lords, in this conflict of authority between * 268 Lord Thurlow and Lord Redesdale, I confess that I think Lord Redesdale's decision is much more consonant with good sense and with the ordinary feelings and habits of mankind than Lord Thurlow's. I again protest against its being supposed, because persons wish to have a formal agreement drawn up, that therefore they cannot be bound by a previous agreement, if it is clear that such an agreement has been made ; but the circumstance that the parties do intend a subsequent agreement to be made, is strong evidence to show that they did not intend the previous negotiations to amount to an agreement. That, my Lords, I think, is the doctrine applicable to this case ; because, even if *Crawter* had authority to grant a lease, I think that sending to the solicitor to desire him to prepare an agreement does not show that *Crawter* intended by that to bind his principal, but rather that he left it to the solicitor to prepare an agreement, in order that when they met, the matter might be properly discussed. I dare say that neither *Crawter* nor *Wharton* had any doubt that the agreement prepared would be one which the parties would be ready at once to accept.

My Lords, upon the grounds which I have stated, I am of opinion that, upon both points, the plaintiff has failed in making out his case. Either one of them would be sufficient to disentitle him to the relief which he has asked. I must say further (though I have not considered the point sufficiently to bind myself by any opinion I may express upon it), I think it extremely doubtful

whether this is a case in which your Lordships ought to interfere by affording the relief of specific performance. It is said that Mr. Wharton would have raised no objection if the Crystal Palace had not been built. Mr. Wharton may certainly have thought,

* 269 "I should never * have been called upon to complete this agreement, if the Crystal Palace had not been built," because this agreement was entered into in 1849, and without discussing about Messrs. Meux's lease, it is quite clear that the original contemplation was that the improvements should take place immediately. But nothing is done for two years. Now, it is extremely doubtful whether Mr. Wharton could enforce any thing against Mr. Ridgway after that lapse of time; and what appears to me to have been passing in Mr. Wharton's mind is this; this negotiation had been going on for some time, and had reached such a point that he thought that in all probability it would be immediately concluded, but after that time, hearing nothing of Mr. Ridgway for two years, he supposed that it was all at an end; and I think that is borne out by what he states in his evidence, that he never heard of any instructions being sent to the solicitor, and that nothing more passed upon the subject till 1852, just before the time when the bill was filed.

The result of all this, in my opinion, is, that the plaintiff is disentitled to the relief for which he asks, not upon the ground which I stated as the ground of my judgment in the Court of Chancery, but upon the ground that there was no authority given to Mr. Cawter to contract, and that if authority was given no contract had been entered into; therefore I move your Lordships that the appeal be dismissed.

LORD BROUGHAM. — I entirely agree with my noble and learned friend upon all the points to which he has directed the attention of your Lordships. I must, in the first place, express my very great satisfaction at the candid manner in which my noble and learned friend has dealt with the case as regards the change, or at
 * 270 least the modification of * his opinion since he heard the case in the Court below. I would that all Judges showed equal candour, and that if any thing happened to alter their opinion, they would state, as he has done, fairly and openly, and in a manly manner, their change of opinion, and not attempt to maintain, at the expense of the law as well as of the suitors, their own

apparent consistency against the facts, the result of which has been a good deal of bad law to be found in our books, and not a little delay in rectifying errors, which ought in the first instance to have been set right, instead of being delayed, sometimes year after year, with the intention of making it appear that they had not originally fallen into mistakes, to which all mortals, Judges as well as others, are liable.

When this case came before your Lordships last session, I was inclined strongly to the opinion that upon both points the case of the plaintiff had failed. The points are, whether or not Crawter had authority, and if he had authority, whether he entered into a final or a binding contract; because, with respect to the Statute of Frauds, supposing the contract was final and binding, I may assume that enough was done to take the case out of the statute. It is not binding unless it is binding according to the statute, or in some way in conformity with the requisitions of the statute, but there must in either case be a binding, that is, a final contract. The first question is, had Mr. Crawter authority? and the second question is, if he had authority, did he enter into a final contract? Upon both points the plaintiff, that is the present appellant, must establish the affirmative if he is to succeed. If upon either he fails, he fails altogether.

Now, my Lords, I certainly, contrary to the opinion of my noble and learned friend, though we never came to any discussion about it, had a strong opinion that Mr. Crawter *had not *271 authority. That opinion has been confirmed upon further consideration. That is a mere question of fact. If it had been a question tried at *Nisi Prius*, it would have been left to the jury to say, "Does this evidence show that there was authority given by Mr. Wharton to Mr. Crawter?" My opinion was, that a jury, and we are now placed in the position of a jury, ought in this case to have come to the conclusion that there was not authority given to Mr. Crawter.

If we are quite clear that there was not sufficient authority given to Mr. Crawter, *cadit quæstio*, because it does not signify whether the contract there entered into was final or not, or, if final, whether under the statute it was binding or not. But my opinion, taking it altogether, though upon that perhaps there might be more doubt, was at that time, and is now, that something remained to be done before the parties considered

that Mr. Crawter and Mr. Wharton, the principal of Mr. Crawter, had contracted, and that therefore there was not a final contract.

My Lords, in reference to the case which has been referred to of *Fowle v. Freeman*,¹ which was before Sir William Grant, my noble and learned friend has justly observed that that does not touch this case. There can be no objection whatever, I apprehend, to that judgment.

With respect to the other case, of *Tawney v. Crowther*,² I can hardly say that Lord Redesdale and Lord Thurlow are in conflict, for I am strongly inclined with Lord Redesdale to think that Lord Thurlow had great distrust in the judgment given in that case. But be that so or not, supposing that it was not so, but that Lord Thurlow was quite clear that he was right, and had no doubt whatever upon the subject, I am strongly inclined to agree with Lord Redesdale and not with the judgment of Lord Thurlow.

*272 *With respect to the point in the case which has been last alluded to, viz. whether this was a case in which a specific performance could have been granted with reference to the circumstances adverted to by my noble and learned friend, it is wholly unnecessary to go into that, for, quite independently of that, upon the first point, whether there was any authority, and upon the second point, whether there was any final contract entered into, I am clearly of opinion against the appellant, and I think that judgment must be given for the respondent; but of course we say nothing about costs: from the circumstances of the case, we ought to affirm the judgment of the Court below, but without costs.

LORD ST. LEONARDS. — My Lords, I had not the advantage of hearing the original argument in this case, when it was heard before my noble and learned friend on the Woolsack, and my noble and learned friend opposite, nor, on the other hand, do I labour under the disadvantage of having then formed an opinion upon the case which I had subsequently found it difficult to remove.

The questions in this case are first of all, Was there sufficient authority given to Crawter as agent of the defendant to bind the

¹ 9 Ves. 352.

² 3 Brown, C. C. 161, 318.

defendant, and next, in the document which Cawter prepared on his behalf did he enter into a final and conclusive agreement. And then there is the question upon the Statute of Frauds, which I understood my noble and learned friend to refer to in his judgment. There are therefore three questions raised in this case, the two which I have mentioned, and the third, which turns upon whether Wharton could take advantage of the statute in question, and say that there had not been an agreement binding under the statute. In the turn which the case * has now taken, * 273 that point would probably not arise. Upon the appeal reversing the decision of the Vice-Chancellor, my noble and learned friend on the Woolsack thought it unnecessary to decide the first point, but expressed his opinion that Wharton must be taken either to have given Cawter an authority to contract, or at all events to have so conducted himself towards Ridgway as to be estopped from disputing such authority. Upon the second point, he thought it clear that Cawter never entered into any binding contract at all; by "binding contract," meaning a written contract signed by himself as the defendant's agent. And upon the third point, my noble and learned friend held that the Statute of Frauds was an available defence for Wharton. It was upon these grounds, which we are now called on to examine, that the judgment of the Vice-Chancellor was reversed. I now understand my noble and learned friend to take a different view, not merely that he has changed his opinion (and I agree with my noble and learned friend opposite in what he has said as to the candid manner in which my noble and learned friend on the Woolsack has expressed his change of opinion), but at the same time I understand him not merely to have changed his opinion, but to have taken a different view entirely; because, as I understand, the second objection that he took was, that there was not a sufficiently binding agreement within the statute, that is, that there was within the meaning of the parties a binding contract, a contract signed by Cawter, as the defendant's agent; there was a concluded agreement, and a contract binding independently of the statute, but there was not a binding contract within the statute, not because the terms were not agreed upon, but because the written agreement was not signed, and my noble and learned friend deciding this case in the Court below thought that the statute was

* available. That third point is now removed from discus- * 274

sion, because we all seem to agree that if there was a concluded agreement it was within the statute a sufficiently binding agreement. Upon that we cannot entertain any doubt. Whether or not it was a concluded agreement is another question, and that is a question depending not simply upon the parol testimony, which we must recollect is the testimony of the parties themselves, for Mr. Crawter, Mr. Wharton, and Mr. Ridgway, independently of Mr. Taylor, are all parties. We have, therefore, as witnesses, those who are interested in the property, and Taylor is interested in reference to character. We shall therefore find it impossible to arrive at a safe conclusion upon this important question, without looking through the whole *res gestæ*, that is, not simply the parol testimony, but the parol testimony with the written testimony that we have before us, by which the former must be tested.

Was Crawter an agent lawfully authorised to bind Wharton in this matter? Crawter, Wharton, and Ridgway were all examined, and there would be, no doubt, considerable difficulty in establishing the agency, if Ridgway's case depended wholly on the depositions. Wharton, after much explanation, swears that he never gave Crawter any authority to make any agreement with Ridgway on his behalf, and Crawter deposes that he never had authority to conclude terms; on the other hand, Ridgway swears that in May, 1849, Wharton said to Ridgway, that he would see his agent Crawter, who did his business for him, and whatever he did would be satisfactory to him, as he was a very honourable man. He said also, that Ridgway was to treat with Crawter; that he managed his business for him. Upon cross examination, he said that Wharton told him he was to treat with Crawter. Crawter told

* 275 him at Carshalton that he had authority from Wharton * to let the house upon the terms in the report; and upon re-examination, he said that Wharton never told him that Crawter had not authority to make a binding agreement; he never asked Wharton if Crawter had such authority; he did not think it necessary.

Let us now endeavour with the light afforded by the acts of the parties and upon the other evidence, to ascertain upon which side the truth lies. Crawter is a land agent, and acted as such for Wharton. It was pressed upon the House at the bar that Crawter was Ridgway's witness, but still we must bear in mind the capacity

in which he acted. Now Crawter being Wharton's agent, Mr. Gregson was his solicitor, and it is material to observe, that Wharton swears that he never had any communication with Gregson about letting the inn to Ridgway until 1852; so that if Wharton had any agent in the matter authorised to bind him, it must be Crawter. When Messrs. Meux declined to renew their lease, and Ridgway applied for one, Wharton saw his surveyor, as he terms him, and directed him to go over to Sydenham on a day named, for the purpose of looking at the "Greyhound," and receiving any communications which Ridgway might be disposed to make; and Wharton communicated this arrangement to Ridgway by a letter of the 17th of May, 1849. On the 22d of May, Wharton wrote a letter to Crawter, which throws some light on the nature of the authority of the latter. That letter was in these terms.¹ That letter, to start with, is important to show that Wharton did, in matters of business, pin his faith on his agent Crawter, and that his opinion would be followed by him.

* Crawter attended at Sydenham, and made a written * 276 report to Wharton, dated the 7th of June, 1849, and recommended certain terms to be offered to Ridgway, which I shall have occasion to refer to more fully in examining the second question.

Up to this time it is clear that Crawter was acting as the surveyor or land agent, and that his recommendations to his employer did not in any manner bind the latter. But according to Crawter's evidence, Wharton after the report said to him, "You may see Ridgway upon the recommendations in your report." On the 22d of June, Crawter wrote to Ridgway that he had been requested by Wharton to see him with respect to his proposition as to the new lease; so that at that time there was a clear proposition in regard to the new lease, and he made an appointment thereon, and added that he would take the papers so that they might talk the matter over. This then was the commencement of the treaty; the meeting took place, but no agreement was come to; Ridgway objected to the terms recommended in the report and asked time to consider.

Ridgway remaining silent, Crawter wrote to him, on the 2d of July, this letter: "Please to recollect you have not written to me

¹ "I beg you will see Messrs. Meux. The gentleman who does much business for the firm is accustomed to take ample care of their interest. I hope you will kindly remember this in any transactions with them," &c.

with respect to the terms for the agreement as arranged when we met on Tuesday last at Carshalton; I cannot do any thing until you do write." The word "written" in the original is under-scored, and seems to show Crawter's desire to get a written acceptance of the terms offered. The answer was manifestly to settle the question whether Ridgway would accept or reject "the terms for the agreement," which were clearly those recommended in the report, but, as we shall presently see, Ridgway had particularly objected to that term of the proposed agreement which

* 277 would have excluded from the lease the triangular * piece.

We must bear in mind that we are now confining our inquiry to the fact of agreeing, not considering what were the terms finally agreed upon.

This letter shows a considerable advance. It was thus answered by Ridgway, on the 3d of July, that is, the next day: "Sir, I beg to apologize for not writing to you before this; but it has been a subject of great consideration on my part; the shortness of the lease, the proposed outlay, and having worked very hard for the last fourteen years with so little profit or advantage, I certainly should feel very much obliged to you if you would allow me a longer term of lease; if not, I must submit to your terms, and will thank you to draw up the agreement at once, as you proposed." This letter clearly shows that Ridgway considered that he was treating with Crawter as an authorised agent; he asks Crawter to allow him a longer term of lease, if not, he (Ridgway) must submit to Crawter's terms, and he requests him "to draw up the agreement at once, as you proposed." It is impossible that the English language could more clearly express the impression of a party that another person with whom he is dealing is authorised to act as his agent when he says, I deal with you as an honourable man, but you press me very hard; if you will give me better terms I shall feel very much obliged to you, but I am in your hands; I am dealing with you as lawfully authorised to act, and "I should be very much obliged to you if you will allow me a longer term." He is clearly treating with Crawter as a person who was agent for the defendant, having his full authority; he says, "If not, I must submit" — to what? "to your terms," to Crawter's terms; "and I will thank you to draw up the agreement at once, as you proposed."

There is no doubt that that document shows that the party deal-

ing, on the one side, with another person affecting to be an agent, believed him to be a fully authorised * agent, and * 278 treated him as such. Now if this treaty had ended by Ridgway's acceptance of Crawter's terms, and if those terms were proved, and there had been no difference about the triangular piece, Ridgway would clearly have been bound; that is a point of law that can admit of no doubt. If there had been no dispute about the terms, that was as clear an acceptance of the terms contained in the instructions to Gregson as ever existed in any case, and would clearly amount to a binding acceptance.

Then we may ask, does Crawter undeceive Ridgway, and inform him that he is mistaken in supposing that he had authority to offer terms, or to draw up an agreement? Does he tell him in the letter to which I am about to refer, "I am only a surveyor, recommending terms for Mr. Wharton to adopt or not as he may think fit"? On the contrary, on the 7th of July, he encloses Ridgway's note to Wharton, who is then made aware that Ridgway believes he is acting with Crawter as Wharton's agent to grant terms, and to prepare an agreement accordingly. It is admitted that that letter was sent by Crawter to Wharton. It was impossible for any man of common apprehension to read that letter without seeing that, if what is sworn in this case be true, Ridgway was allowed to remain under a delusion; he was permitted to go on dealing with Crawter, whom he had expressly treated with as an agent lawfully authorised; and neither the agent nor the principal ever advanced a single word in contradiction or in explanation of that impression. That letter refers to Ridgway's agreement, to the terms in the recommendations, and to his request to have the triangular piece included, which Crawter recommends. Now, that letter is a most important letter. It is the letter which followed that of the 3d of July from Ridgway to Crawter, in which he treats him as having full authority. In this letter from * Crawter to Wharton himself, he encloses a copy of Ridg- * 279 way's note, and says: "Ridgway is very anxious to have the triangular piece, containing 0a. 3r. 12p., included in the new lease, and as he agrees to lay out 600*l.* in building and sinking a well, and the other terms, it is not an unreasonable request to have it included, and under all circumstances, I recommend you to do so, and should you approve, the agreement can be prepared in accordance with my report, but including the 0a. 3r. 12p., and

on hearing from you, I can (if it is your wish) furnish Mr. Gregson with the necessary particulars for the agreement."

Now, nothing can be more conclusive than this letter. After the letter I have read from Ridgway to Cawter, we have Cawter writing to his own principal, telling him in the most explicit language, that the terms proposed are agreed to by Mr. Ridgway, with the exception of the triangular piece; and it is requested that that may be included. Cawter recommends Ridgway's request should be acceded to, but he does not take upon himself to act in that matter. He says: "If it is your wish, I will furnish Mr. Gregson with the necessary particulars for the agreement." This was clearly binding at that moment, not upon Wharton as regards the triangular piece, but clearly there was a binding contract on the part of Ridgway, as he said that he agreed to the terms proposed. Would not the parties feel that he could not withdraw from this if they were ready to take him at his word? Cawter says it is very fair to include the triangular piece, and if you will authorise me, I will direct Gregson, your solicitor, to draw an agreement. Now, what proof have we that that was adopted and acted upon? If it was adopted, there would seem to be an end of the case as far as that is concerned.

Let us pause here. Cawter says: "Should you approve,
 * 280 * the agreement can be prepared in accordance with my report, but including the triangular piece, and on hearing from you, I can (if it is your wish) furnish Mr. Gregson with the necessary particulars for the agreement." Still, therefore, all depended upon Wharton's wish, for Cawter could not act contrary to his own recommendations without Wharton's consent. If he consented, all would be clear. Ridgway had agreed with all the terms but one, and Cawter recommended that to be given up. Wharton's acquiescence would at once make a complete bargain.

What more can be required as regards the question of agency? It is clear that Wharton did acquiesce, and Cawter sent written instructions to Gregson as terms for an agreement for a lease to be granted by Wharton to Ridgway. Upon those terms I shall have some further observations to submit to your Lordships upon the second question. Cawter says he had no more to do with the matter, but his letter expressly desires the agreement "to be sent to Messrs. Cawter, No. 7 Southampton Buildings, and therefore he acted in the matter, for he was still carrying on the agency,

and the agreement was sent to him ; by whom ? by Wharton's own solicitor.

This paper comes out of the custody of Wharton's solicitor, who appears to have been led to believe, like Ridgway, that Crawter was an agent fully authorised by Wharton, for there are indorsed in pencil these words, " Mr. Crawter's terms for agreement sent to Mr. Gregson, July 30, 1849." Crawton deposes that Wharton desired him to send his recommendations to Gregson his solicitor, which he did on the 30th of July. It is observable that in this instance no answer by Wharton to Crawter's letter to him of the 7th of July is produced ; such a letter must have cleared up any doubt in this case, but unfortunately a letter written by

* Wharton to Crawter in 1849, on the subject of letting the * 281 premises, Wharton informs us, does not now exist. Observe, the letter ought to be in the custody of Crawter, but Wharton says that he destroyed it in 1852 ; he wished to see it again, thinking it related to the time at which the increased rent was to commence, there being some difference between him and Crawter as to their understanding of what Ridgway meant in that letter. How important may that letter have been ; and we are at liberty to draw an inference that it fully authorised Crawter to send the instructions to Gregson as the terms upon which Wharton, by his agent, had agreed to let the inn to Ridgway. That would be consistent with all the facts, and there could be no difficulty whatever in point of law in so treating it. Wharton on his cross examination says that that letter contained nothing authorising Crawter to make any agreement, or an acknowledgment that any agreement had been made. We shall presently see how little reliance can be placed upon a recollection of such a letter.

But the matter does not rest here. On the 27th of August, Ridgway wrote to Crawter that he had been expecting to receive from him the copy of the agreement ; he says, " Will you be kind enough to send it to me at your earliest convenience." Ridgway therefore still supposed, and acted upon the belief, that Crawter was the agent of Wharton in this matter. This letter Crawter admits that he sent to Gregson, and it is indorsed, " Answered, and sent to Gregson, September 25." Look then at Crawter's answer of the 25th of September, a very important answer. This is the answer to the letter of Ridgway of the 27th of August, applying for the agreement. That agreement is sent to Gregson the solici-

tor, and then Crawter writes this to him : " Mr. Wharton's solicitor had instructions from me, long since, to prepare the
 * 282 agreement, and I fully expected he had * done so, but my absence from town has prevented my seeing him, but will do so in a day or two. Mr. Taylor has been trying to learn from Mr. Wharton the terms arranged with you, but which neither he nor Messrs. Meux can have any thing to do with, and he seems to intimate that Messrs. Meux should have had the refusal of the premises, but I can remind Mr. Taylor that they had the offer of them, and he on their behalf declined. It strikes me the less communication you have with Mr. T. the better."

Now, is that or is it not the letter of a man continuing to act in the capacity of an agent lawfully authorised? We have there Crawter, in the clearest terms ever penned, writing by the direction of his principal. After long treaty, by direction of his principal he writes to the solicitor to prepare an agreement; and then when he is applied to, he does not say, " I am no longer the agent, but Gregson; Wharton means to advise with Gregson "; Wharton never meant any such thing; Wharton himself swears that he never had any communication with Gregson about the agreement; why should he? Could any thing be so absurd as to talk to Mr. Gregson about terms, when it is quite clear that he never intended to submit the terms to Mr. Gregson, but they were already agreed to.

We have seen the agreement, and observed the words used, " Instructions from me "; that is the expression which Crawter uses when writing to Ridgway; " Mr. Wharton's solicitor had instructions from me to prepare the agreement "; no longer have we the word " recommendation " or any such vague expression as that used; " recommendations " had ripened into treaty, and the recommendations had now become " instructions," and clear and explicit instructions; and in this letter he speaks of the promise he had given, and we have the advice that he gives Ridgway, and he speaks of " terms arranged with you." This, as we

* 283 * shall presently see, is a most important document upon the second question. And upon the point we are immediately considering, it shows that the recommendations of Crawter had been adopted as the terms of a contract, and then became instructions for a formal agreement. Crawter's memory is not very tenacious; he does not remember returning any letter to Wharton

in 1849. When he sent Ridgway's letter of the 8d July to Wharton, he says he cannot say whether he wrote with this letter, as he did not consider it of importance, yet in point of fact he wrote and sent to Wharton the letter of the 7th July, which is of so much importance in this matter. Messrs. Meux and Company held the original lease, and we have seen the advice given by Cawter to Ridgway, how Taylor was the man of business of the firm, and he swears that in 1849 he applied to Wharton personally for a renewal of their lease; Wharton said "that the house was irrevocably gone from us, and that he had let it to some one else." He afterwards ascertained from Cawter that it was to Ridgway. Wharton told him he had finally agreed with that other party; "I was satisfied that the house was finally disposed of." It is not possible to approve of the conduct of Wharton in 1852, when Messrs. Meux's lease was about to expire, and the property had become more valuable. It shows the way in which the parties are endeavouring to evade the agreement rather than to perform it. The question arose at last early in the year 1852, when the lease was about to expire, in this way: Ridgway again wrote applying for the lease to Cawter, "Sir, I have the honour to apply to you for the agreement regarding this house which you were good enough to say should be forwarded to me. I trust you will not think me troublesome, but I am anxious on the subject as the time is drawing nigh." Now what is the answer to this letter? "Sir,— 'Greyhound,' and premises,— I find it is as far back *as 1849 * 284 that I reported to the Rev. Mr. Wharton, since which changes have taken place, and he has now requested me to view the premises, for the purpose of arranging the future letting, which I hope to do one day next week, and will then see you." Was there in the minds of these gentlemen a conviction that no agreement had ever been entered into, and that the plaintiff had no right to call for a copy of the agreement? that no terms had been arranged, and that Cawter was not authorised to do this act? Nothing of the sort; but they evade altogether the performance of this solemn agreement, for such it was, of which the parties had approved, and they talk about the times having changed, and, of course, their opinions changed with them.

This is mere evasion; there was no prior doubt about the agreement; and in these cases you are at liberty to take into consideration not only what the party does say, but also what he does not

say. From his silence you may imply that he does not dispute, but assents to the claim made. Upon the whole, then, I am clearly of opinion that Crawter was the fully authorised agent of Wharton in this matter.

The second question is, whether Crawter came to a concluded agreement with Ridgway. I cannot say that I ever saw an agreement framed with more care and deliberation than this agreement. Upon all the evidence taken together, I think this is as clear a case of agency, on the whole of the case, as I have ever seen. I think if I had been upon a jury I could have had no hesitation in returning a verdict for the plaintiff; and acting here in the capacity, in fact, of a jurymen, I come solemnly to the same conclusion.

That leads me to the second important consideration, whether there was a concluded agreement; because it would not be sufficient to show that Crawter was Wharton's authorised agent, * 285 unless you can also show * that he entered into a binding contract. What I have already stated to your Lordships will very much shorten what I have to say upon this point. There are two exhibits in this case, A. and B.¹ The report made by Crawter to his principal contains all the terms which he recommends, and upon which he proposes to grant a lease to Ridgway of the property in question. Now let me observe that no document was ever produced in any court in which the terms were more clearly defined or with greater accuracy than they are in this document now before your Lordships. Every single thing that ought to be provided for is provided for; the terms upon which the lease is to be granted, — the sum of money to be expended upon the property, — the amount to be paid, and the taxes to be paid; and observe, my Lords, another matter, which is this, that when you have established the agency by letters, that agreement is to be construed precisely in the same way as a regular agreement would be. The main binding terms are provided for; no objection can ever arise because there are collateral circumstances which necessarily flow out of such agreement, and which are not mentioned. If there was any thing peculiar it would be incident to the agreement, and it would be supplied by the Court as it is in every contract, just in the same way as if it had been a regular agreement; but this agreement wants nothing.

¹ A. Crawter's Report; B. Crawter's Instructions to Gregson.

This is one of those rare cases in which every thing is in writing, and every thing clear, and every single term of a proper contract is clear and explicit, and not open to doubt. We see clearly what the terms were, for we have the letter of the 3d of July submitting to the terms. I have already stated that, in my apprehension, if Wharton chose to adhere to all the terms

* in the report, the letter of Ridgway accepting the terms * 286 offered would have bound him; Crawter tells him those were Wharton's terms, and there would have been therefore a clear binding contract. Now Crawter's letter of the 7th of July removes altogether the difficulty, because he recommends Wharton, his principal, to include the triangular piece. It is perfectly clear, therefore, it is beyond the possibility of a doubt, that Wharton did acquiesce, and that the instructions show his acquiescence; and that which is sent to his solicitor, Gregson, with the desire of Wharton to have a regular agreement drawn up, contained every single term which it would be necessary to state in order to form a clear binding agreement. There is the letter of the 3d of July, which is an acceptance of terms by Ridgway; that is sent by Crawter to Wharton on July the 7th, 1849.

LORD BROUGHAM. — Indorsed by Mr. Gregson.

LORD ST. LEONARDS. — I cannot tell that. It comes into Wharton's custody, and there is a pencil note upon the same letter, and the words are not unimportant. These parties therefore were uncommonly astonished themselves when they found that there was no agreement entered into for this purpose. Mr. Gregson understood this matter, for he says, in a letter of the 24th of December, 1852, that it appears from his minute book, that he received instructions as to the Greyhound Inn, in July, 1849, from Mr. Crawter, and not personally from Mr. Wharton. Now there has never been any dispute about the terms. My Lords, this is one of those singular cases in which, there being a question whether there is a sufficient agreement entered into or not, there has never from first to last been any dispute about the terms. There could not be, because the terms are so explicit in the report, that it was only with reference to the doubt and difficulty about the triangular * piece of ground that any * 287 question could arise, whether it was included in the agreement or not. The question arising out of that was a question as to the intention of the intending lessor. Then we should expect

to find the agreement what it is. Now let us see what it is. I am at a loss to conceive how, after the instructions reached the hands of Mr. Gregson, the solicitor, in order to prepare an agreement, it is possible to contend that there was not a concluded agreement. How did it find its way there? By the direction of Wharton's own agent; with Wharton's own knowledge. Let us see what it is. It was headed, "Memorandum of terms for an agreement for a lease to be granted by the Rev. Mr. Wharton to Mr. Mark W. Ridgway"; "Terms for an agreement for a lease to be granted by Mr. Wharton"; and all this is upon a matter of speculation! Then the premises are set forth by acres, roods, and perches (the triangular piece included); then comes this, "An agreement for a twenty-one years' lease, to commence at the expiration of Messrs. Meux and Company's terms." That is very important. Then follows: "Mr. Ridgway to lay out not less than 600*l.* in taking down and rebuilding part of the Greyhound Inn, viz. two parlours and rooms over, and in sinking a well; the lease to contain covenants to uphold and keep the whole of the premises in substantial repair, and so deliver up the same; the rent 70*l.* clear; the tenant to insure, and pay all the taxes."

In the course of my experience, which has been considerable, both in point of length, and in point of attention to matters of this sort, I have never seen a more concluded agreement, as it appears to me, than is made out by the previous evidence in this case, and is contained in this document. It contains every thing. It

would be a sufficient agreement to be specifically performed
 * 288 in * a Court of equity without the least doubt being thrown upon it.

Now, my Lords, if the terms of an agreement are sent to a solicitor,—my noble and learned friend on the Woolsack says, and I do not at all differ from him upon that,—if the terms of an agreement are sent to a solicitor to prepare an agreement, that is binding. I think my noble and learned friend has not stated, and therefore I may state, that the solicitor has not the slightest power to alter any one of those terms which are thus sent to him as instructions to prepare a formal document. He is bound mechanically to perform the duty of preparing a lease according to those terms; and it would be a dereliction of duty if he attempted to introduce any alteration in those terms, and, in fact, it could only lead to disputes between the parties for which he must hold him-

self responsible. Now, let us just meet an objection which has been made, that this may be termed an agreement which was afterwards to be executed. I must altogether deny, as strongly as I can, that in my view it is possible to put that construction upon it. I cannot agree that the facts admit of it. If the parties have not concluded terms, but have sent unconcluded terms to be put into form, it may require consideration whether that is binding or not; but the question is whether the terms here were concluded. My view is that the terms were concluded; and if they were concluded, then the sending of those terms to a solicitor to prepare an agreement would not authorise the solicitor to alter a single one of those terms, but he must take them just as he finds them. And if there were such words to be found as are found here, "Memorandum of terms for an agreement for a lease to be granted by the" one to the other, I do not know that we could find stronger expressions in the English language, or expressions that would convey more clearly than this * document does, a * 289 concluded agreement in all its terms to be carried formally into execution by Mr. Gregson. Why, the facts themselves prove it. If you want evidence, as I have already said, Wharton swears that for two years he never had any communication with Gregson upon this question. There could be no doubt, therefore, that it was a concluded agreement. He never interfered. Mr. Gregson never supposed that he had any authority to alter the terms. Mr. Gregson does not say why he did not prepare the agreement, nor indeed does Mr. Gregson tell you that he did not prepare the agreement; you have no evidence that the agreement was not prepared. Of course, Ridgway did not like to call Gregson. He was forced to call Cawter as his witness, but he did not like naturally to call Gregson, because Gregson was the solicitor of the adverse party. Wharton did not call his own attorney. If Gregson had thought that he had any authority, and he had been acting upon that authority, and had altered the terms, or had not prepared the agreement, he might have said so, and nothing would have been so easy as for him to disprove the agreement.

Wharton did not communicate with Gregson till 1852. I have stated, in the course of my observations to your Lordships, that where an agreement is established by a plaintiff, any formal matters incidental to the agreement may be supplied just in the same way as in an original agreement: your Lordships will

find that laid down, among other authorities, in *Stratford v. Bosworth*.¹

Then on the 27th of August, Ridgway urges Cawter to let him have a copy of the agreement, and Cawter writes to Gregson, on the 27th of September: we have already seen Cawter's letter that binds Wharton. Now Cawter is his agent. Cawter writes

* 290 to Wharton for authority to * agree to the terms of the instructions; and, after that, Cawter gives them to Gregson, to draw an agreement, with the authority of Wharton. Of that there is no doubt. Cawter refers, in writing, to the instructions from which Gregson is to prepare the agreement, and says that the terms are arranged between them. Thus, Exhibit B. (the instructions) is identified beyond all doubt.

My Lords, this therefore is not a case in which you at all want parol evidence. My noble and learned friend has come, no doubt, to a just conclusion, that this is a perfectly clear agreement, within the Statute of Frauds. It is not a question whether the contract to be proved resting partly upon parol evidence, and partly upon the written evidence, you could have allowed the defence of the statute, which I thought at first was one of the great questions in this case; there is no such question now; because it is admitted that this is a sufficient agreement within the Statute of Frauds, and the only question is, whether it is or not a concluded agreement.

Now, my Lords, I confess I did not understand how my noble and learned friend on the Woolsack made out that the terms were not concluded. He did not advert to the *nota bene* at the end of Exhibit B.; that *nota bene* is in these words: "Mr. Ridgway is about to arrange with Messrs. Meux and Company for the remainder of their term, viz. three years at midsummer, 1849; and therefore the outlay would be immediate on the agreement being entered into, the draft of which please to send to Messrs. Cawter and Company, Southampton Buildings." You will observe, if you refer to the original document, that that is put as a *nota bene*, after all the terms are stated, and then two lines are drawn, so as to show that it is not part of the agreement itself. Now, if you turn back to the report, which contains what were recommenda-

* 291 tions, and which ultimately became * the terms agreed upon, you will find that the offer by Ridgway was to buy up Meux's

¹ 2 Ves. & B. 345.

interest; and you will find that Crawter, Wharton's agent, tells Mr. Wharton himself that he does not think it for the interest of Wharton that he should agree to that; but he says: "I have recommended the following terms," not one of which is to buy up Meux's interest. There is no doubt it was first intended, if possible, to buy up Meux's interest; but it is equally clear that that was abandoned, and with the approbation of every one; because, as Messrs. Meux were the tenants immediately holding of Wharton, and were paying him rent, and Ridgway was the under-tenant, and, as I conclude, to pay the rent, of course Wharton would answer that Messrs. Meux were still in possession of the original lease, and he not only never required Ridgway to perform this part of the agreement, but by Crawter, his agent, he tells him, in effect: "Taylor has nothing to do with the agreement between you and me; do not mix yourself up with him. It strikes me, the less communication you have with that dangerous man the better." There is no dispute or doubt in regard to the validity of the agreement; there has never been any objection made to it; it is as clear as it could possibly be; but there was a delay; there was, however, a reason for this delay. The premises were very much out of repair; for their want of repair Messrs. Meux were liable, and of course they were perfectly competent to answer their liabilities. The money coming from those dilapidations Wharton never would have allowed to reach a pocket to which it ought not to have gone, namely, Ridgway's. Ridgway was bound to perform his agreement, which was wholly independent of any lease held by Meux: therefore by leaving the lease still in the hands of Meux, Wharton continued to have not only his remedy against very competent persons, but a certainty of recovering * from * 292 them for the dilapidations; but it does not affect this agreement, and therefore, in my apprehension, it cannot be brought to bear.

I think I understand my noble and learned friend to say, that he thought there was considerable ground in respect of the delay against the specific performance which is now sought by the appellant. I cannot agree with him upon that point. I do not think there was here any delay such as to lead to the Court refusing the specific performance. Here the delay is on both sides. No man can take advantage of his own fraud. But whose was the delay? Not Ridgway's, but Wharton's. When was the money

to be laid out that was to be laid out under this agreement? It was to be laid out, according to this *nota bene*, on the agreement being entered into. The defendant having agreed to terms, and proper instructions having been sent to Gregson, and Ridgway having repeatedly applied for the agreement, why did he not have it completed? He makes an excuse for not sending it to Ridgway, — he excuses the delay that had taken place, and the delay is accounted for by the circumstance which I have before stated. I do not cast any blame upon Wharton for the delay, because it was not material that it should be otherwise, and I think it is very likely that Wharton would not have liked to part with his reversion, and granting a new lease would have had that effect, before he had recovered for dilapidations; but however that might be, there was a subsisting lease up to 1852, and whilst that lease subsisted, this agreement being a perfectly valid and binding agreement, it did not appear to be necessary to take any active measure.

My Lords, I did intend to state the authorities to your Lordships upon this subject; but it is totally unimportant * 298 now, I think, because it is agreed that there is a * sufficient contract within the Statute of Frauds. I would simply, without going through the cases, observe, that in the case of *Tawney v. Crowther*,¹ it is not at all material whether Lord Thurlow was right in construing the words to amount to an acceptance of the agreement. One man may think that those words were sufficient, and another man may think that they were not. It is not worth discussing; it relates to a particular transaction; but in this case the question is quite a different one, and that case is an authority for this, — that if terms are reduced into writing, and a man says he will abide by those terms, and will sign the agreement, suppose he says so in so many words, although he does not sign the agreement he is bound by that. That is what the case amounts to as an authority, and it is a very important case. That was upon the Statute of Frauds; and Lord Thurlow, in the first instance, overruled the objection founded upon the Statute of Frauds. And then, when the case came on again upon the answer, he was of opinion that all that had passed amounted in effect to an agreement, and in that view it is no doubt a very important case. But upon the other question there are many cases.

¹ 3 Brown, C. C. 161, 318.

I will not trouble your Lordships with them ; but there are several cases in which a single note written by one party to a solicitor to draw an agreement, independently of the agreement, has been held perfectly valid. I will just mention the names of them ; one has been quoted : *Western v. Russell*,¹ *Thomas v. Dering*,² and *Gibbins v. The Board of the Metropolitan Asylum*.³ These cases settle the question.

I have spoken very strongly upon this case, as I feel strongly upon it so far as my opinion goes. I am aware that that opinion will not prevail in this case. I should *not have * 294 sat to hear this case at all, if my noble and learned friend on the Woolsack had not asked me to do so ; and as my noble and learned friend on the Woolsack, and my noble and learned friend opposite, retain the impression received on the first argument, it is wholly unimportant, and I have only occupied all this time out of respect to my noble and learned friend, for I should not be very likely to differ from him without great hesitation and considerable pain, and that your Lordships may also be satisfied that in expressing my opinion as strongly as I have, I have done no more than is consistent with the duty of those who have cast upon them the duty of advising your Lordships, I do so after careful consideration, and with some diffidence.

LORD WENSLEYDALE. — My Lords, in this case there are four questions which have been argued at your Lordships' bar. The first and most important by far of these is the question, whether a final binding bargain was made and agreed upon, in all its terms, between the plaintiff and the defendant. The second question is, whether, if there was a solemn agreement made between the parties, there was a sufficient note in writing of that agreement to take the case out of the Statute of Frauds. The third question is, whether, in answer to the case made by the plaintiff, it is competent to the defendant to set up a defect, if there was a defect in this note of the agreement. And the last question is, whether, after the lapse of two years or more from the time the said agreement was entered into, the plaintiff has any right now in a Court of equity to call for a specific performance of that agreement.

The important question is the first. With regard to the

¹ 3 Ves. & B. 187.

² 11 Beav. 1.

³ 1 Keen, 729.

second question, my noble and learned friend on the
 * 295 * Woolsack has admitted that he was under an error in
 supposing that the objection to the agreement founded
 upon the Statute of Frauds could be taken upon the answer. He
 has stated that, upon a full consideration of the case, he thought that
 assuming Crawter to have been the agent of the defendant Whar-
 ton, inasmuch as Crawter has referred to the instructions which
 are said to have contained the terms of the agreement, and those
 instructions do contain the terms of the agreement, the act of
 Crawter was an act competent to bind his principal, and therefore
 there is a sufficient reference to the instructions to make the con-
 tract binding, and to take the case out of the statute. I offer no
 opinion upon the last question. It is purely a question for a Court
 of equity, though certainly it does strike me very strongly that we
 should never have heard of any application to enforce this agree-
 ment if it had not been that the Crystal Palace was about to be
 built in the neighbourhood, and consequently the plaintiff thought
 that he should get a good bargain. But I dismiss that entirely,
 because having formed an opinion upon the first and important
 question in the case, it is quite sufficient to dispose of it without
 reference to the others.

That is a question which Courts of law and Courts of equity are
 equally competent to decide. It is a pure question of fact to be
 decided by a jury in a Court of law, and by a Judge acting as a
 jury in a Court of equity. And though I would not venture to
 put the knowledge which I have acquired of the law in competi-
 tion with that of my noble and learned friend opposite, yet upon
 this question I feel myself just as competent to offer an opinion as
 any of your Lordships. And the view which I have taken upon
 that part of the case, and the view which I took at the time
 * 296 the case was argued at the bar, is certainly a * very strong
 one, that if it had been my duty to sum up this case to a
 jury, in order to ascertain whether there was a real and final
 agreement made, first of all raising the question whether Crawter
 was agent of Wharton for the purpose of concluding a binding
 agreement, so far do I differ from my noble and learned friend op-
 posite, that though I should not have nonsuited the plaintiff (be-
 cause there is some slight evidence for the jury to consider), yet
 I should certainly have left it with strong observations to the jury
 that the plaintiff had not made out his case.

Now this proposition, which is an affirmative proposition, and which lies at the root of all the subsequent questions raised in this case, is a proposition to be distinctly made out by the plaintiff. He must satisfy the Court, not so as not to admit of a reasonable doubt, but upon the balance of the evidence that Crawter was the defendant's agent. He must prove that as a matter of fact, and if he leaves that question at the end of the case in even scales, the plaintiff cannot prevail.

In order to ascertain whether there really was any authority given to Crawter by the defendant to enter into this agreement, it is necessary to consider minutely and accurately what the necessary authority is, and then to look at the case to see whether there is any evidence of such authority. Wherever a man purports to make a contract with the agent of another, in order to bind that other, the agent must have authority from him. It matters not whether it is authority previous or subsequent. If a man, professing to act for another, makes a contract for him, and authority is afterwards given by that other, the authority given subsequently is equal to authority given before, according to the old maxim, *omnis ratihabitio retro trahitur et mandato æquiparatur*. If a contract is made by an agent, whether by authority before given, or afterwards, by *ratifying the contract it equally binds the * 297 principal. Now we will look at the evidence in this case, and the question will be whether, first of all, there was any prior authority given by the defendant to Crawter to make the contract, and you will see how very slight is the evidence upon that subject. In fact, there is no evidence whatever, when you come to analyze the case; and in the next place, this contract purporting to be made on behalf of the defendant, the question will be, is there any subsequent ratification; and your Lordships will see, when I call your attention to it, how very slight is the evidence of ratification.

Then there is a third mode by which the defendant may be bound. Though he has given no authority to Mr. Crawter, he may have represented to the party with whom the contract has been made, that he has given such authority; and if he has done so, or has done what is equivalent to treating the person who has made the contract as his agent, he cannot afterwards recede from the contract, but he is bound by it, and is estopped by that representation. Therefore the plaintiff may put his case upon the ground that there has been a representation made to him by the

defendant that Crawter was the defendant's agent, not for the purpose of negotiating or treating about a lease, but for the purpose of entering into that lease, and the question upon that is whether any thing has been stated by the defendant to justify the plaintiff in concluding that Crawter was his agent for that purpose. My noble and learned friend has said that the plaintiff honestly believed that Mr. Crawter was the agent of the defendant for the purpose of entering into the agreement, or at all events that he was the agent concerned in it, and acted as such. There may
 * 298 be a great deal of evidence upon that, but the * question is whether he had any right so to believe from any thing that had been said to him.

In order to make out the case of the plaintiff, the first witness who is called is Mr. Crawter ; he is an independent witness, and any thing that he says is more entitled to credit than any thing that the plaintiff says on his own behalf, or that the defendant says on his behalf. My noble and learned friend seems to treat every thing that is said by the plaintiff in the course of this case as entitled to full credit ; he appears to think that the plaintiff, who swears on his own behalf, is just as much entitled to credit as an independent witness. A plaintiff, certainly, by the alteration of the law which was made two or three years ago, and which turns out to be very effective and very useful, is allowed to be a witness in his own case. When a plaintiff appears before a jury as a witness, the jury upon hearing his evidence, and seeing the manner in which it is delivered, may rely upon it ; but as a general rule, a jury ought not to rely upon the evidence of the plaintiff, certainly not when he is contradicted by any independent witness whatever. It is of very little avail if there is such contradiction. And your Lordships will find the plaintiff's evidence in this case contradicted by an independent witness, Mr. Crawter. In a Court of equity Judges have not the same advantage that they have in Courts of law, of estimating the value of the evidence by seeing the witnesses. Unfortunately they are examined behind the back of the Judge, and therefore there is no rule upon which he can act in estimating the value of the evidence, except that of looking at the collateral facts. And if you find the plaintiff stating acts which are contradicted by
 * 299 an independent witness, or even contradicted by the defendant, I do not think * that you ought to place much reliance upon his evidence.

Let us see what the evidence is that is given to show what the authority of Crawter was. In the first place, Crawter is called with a view to show that the defendant gave him authority, and Crawter says as to this part, which is material: "I told the plaintiff I had no authority to go into that question. My only duty was to view the property, and report upon it to the defendant." Therefore it appears that the plaintiff was then informed by Crawter that he, Crawter, had no authority whatever to enter into a final binding lease. "My only duty was to view the property, and report upon it to the defendant. I told him that I should recommend that the triangular piece of ground should not be included in any future letting"; and then he goes on to say: "The plaintiff said that if he had the premises he should like to have the triangular piece of land. I had no authority to communicate to the plaintiff the terms of my report. I never conclude any thing without consulting the party who employs me. I certainly do not consider that I arranged terms with the plaintiff on that occasion." Then afterwards he says: "When I saw the defendant in June, my instructions were to communicate to the plaintiff the terms of my report. It was in consequence of those instructions I met the plaintiff at Carshalton. I had no further authority from the defendant. I never had any authority from the defendant finally to settle and conclude terms with the plaintiff at Carshalton; I merely read the terms of my report to the plaintiff. I had no authority to go beyond reading to the plaintiff my recommendations. I never had any authority to conclude terms. I never proposed to the plaintiff that I had authority to agree to a lease." Therefore upon that point he contradicts the plaintiff, who swears to the contrary. * "The plaintiff told me, either at Carshal- * 300 ton or at the survey, that he thought he could get the residue of Meux's lease." That is the effect of Crawter's evidence, in which he denies altogether that he had any authority whatever from Mr. Wharton to enter into a lease.

Then Mr. Wharton is called as a witness for the plaintiff, and he says just the same thing as Crawter. "I do not remember whether I said that Mr. Crawter managed my business"; that is a very vague term, and does not imply that Mr. Crawter had authority to grant leases. "If by the word 'business,' my Sydenham property was intended, I am quite sure that I said no such thing." Upon that point he is contradicted by the plaintiff. "I am sure that I

did not say to the plaintiff that whatever Mr. Crawter arranged I should be satisfied with." That is another fact upon which the plaintiff relies as having been induced to treat with Mr. Crawter. He swears that he never did say that to the plaintiff; therefore you cannot consider that as a fact proved. Then he says: "I did not communicate to Mr. Crawter any thing about the triangular piece of land after receiving the letter of the 7th of July, 1849. After receiving that letter, I think I must have let Mr. Crawter know that he was at liberty to lay the whole particulars before Mr. Gregson." Then he says, on being cross examined, "I never gave Mr. Crawter any authority to make any agreement with the plaintiff on my behalf."

There is, therefore, on the part of the defendant, and on the part of Mr. Crawter, the most positive statement, upon their oaths, that no authority was ever given; and Mr. Wharton is not asked by way of examination whether, knowing that an agreement had been entered into, he afterwards ratified it. That part of the case depends altogether upon a loose expression used by the defendant to

Mr. Taylor, and therefore it is quite clear beyond all doubt,
 * 301 and it would not * be a matter of a moment's doubt before a jury, that no authority, in point of fact, was given previously.

Then is there any evidence of a representation of authority made to the plaintiff by the defendant, and has the plaintiff been deluded into entering into this contract by a representation being made to him by the defendant that Mr. Crawter was authorised to make it? Now we will look and see what Mr. Ridgway says upon that subject, and see whether you can conclude, even from his own statement of the transaction, that any thing had passed to induce him to believe that Mr. Crawter was any thing more than an agent to enter into a treaty, and not finally to conclude a bargain; that he was merely to value the property, and to recommend to the defendant what should be done.

Mr. Ridgway is examined also on his own behalf. He says: "I called upon the defendant about May, 1849. I told him I had called to know Meux's answer, and he said they did not require it; it was open to me. He said he would see his agent, Mr. Crawter, who did his business for him; for whatever he did would be satisfactory to him, as he was a very honourable man." That is contradicted, as I have just stated, by Wharton's testimony. But even if it is

not contradicted, it does not go for much, because when a man says that he would be satisfied with every thing that another would do, it does not mean that he had authorised that man to make a bargain for him, but that, in all probability, he would concur in every thing that such a man would recommend. "He spoke very highly of him. Then I left him, with a perfect understanding that Mr. Crawter was coming over to me, to view the premises." He said also that it was to treat with Mr. Crawter; that he managed his business for him. If that is proved, it only goes to this, that Crawter should treat for him, and that he, the defendant, would probably sanction what Crawter * did, but no * 302 more than that. Then he says: "Suppose we say that you would lay out 600*l.* altogether. I asked him then for a little time to consider before I decided, as the terms were high. He said certainly. That is all that took place." There is not a word said in the plaintiff's evidence about the triangular piece of ground, although it is perfectly clear that that was part of the negotiation that then took place. Then he goes on afterwards to give what approaches something like a statement, to induce the plaintiff to act upon the footing of Crawter being the authorised agent of Wharton to enter into a contract. "Mr. Wharton said he would see Mr. Crawter, and arrange with him to come over to Sydenham. Mr. Crawter is my agent: whatever he does I shall be perfectly satisfied with." That is a repetition of the same story, and to that there is the same contradiction made by the defendant. Then he says this, which is very strong in the defendant's favour: "The defendant did not say, in terms, that Mr. Crawter had authority from him to make a binding agreement; he said I was to treat with Mr. Crawter." Mr. Wharton tells him to treat with Mr. Crawter. Could anybody suppose from that, that Mr. Crawter was authorised to make a binding agreement, without any power of considering it on the part of the defendant?

Therefore when you look at the account given by Ridgway himself of what took place, it really does not amount to any thing like an assurance from him that Crawter was authorised to make a binding contract; and no reasonable man ought to have concluded from that that that was so, whatever Ridgway may have thought upon the subject; though it does not appear distinctly that he ever thought, at the time, that what was done would bind the defendant.

Then with respect to the evidence of subsequent ratification, * 303 that is confined to a vague expression used by Wharton to Taylor, when Taylor was trying to negotiate for a lease, in 1849. Wharton says to him, "O, you are too late." This is the expression used: "He, Mr. Wharton, said the house is irrecoverably gone from us, and that he had let it to some one else, but I was under the impression that it was to Ridgway, which fact I afterwards ascertained to be true from Mr. Crawter. Mr. Wharton told me that he had finally agreed with that other party. I was satisfied that the house was finally disposed of." Striking out the rest of the evidence, which does not amount to much for the purpose of proving any original authority, that is the sole evidence in the case upon which the plaintiff relies as proof of ratification. Upon the construction of these words, I should say that they mean, I have agreed to grant a lease, but they do not imply that Crawter is the agent who is authorised finally to enter into this agreement, and that you must consider that Wharton has ratified the agreement that Crawter has made. The expression is much more like an expression made use of with a view to avoid further communication with Taylor, who came to ask about the lease. Wharton very probably said to him, in these very words: "It is too late, the matter is finally disposed of"; though he might have meant to say, "This matter is settled, or in all probability this matter will be settled, and there is no reason therefore for you to make an application." The true construction of that, in my opinion, is that the expression was used by the defendant solely for the purpose of preventing further trouble in the matter.

If you look, therefore, at what real evidence there is in the case, in truth there is nothing upon which any reliance can be placed to prove the authority of Crawter. The plaintiff is not to be * 304 believed when he states a case for * himself which is flatly contradicted by the defendant, and also contradicted by an independent witness, Mr. Crawter, and there is no real evidence in the case of any contract whatever being entered into. And with regard to the ratification, it rests upon a mere light expression, which probably meant no more than that the thing was so far gone that it was useless for Mr. Taylor to think of getting a lease of the house. Therefore, in my own mind, I have not the least doubt about the case. As I differ from my noble and learned friend, I must regard my own opinion upon the subject as not perfectly

satisfactory ; but deciding the case for myself, and acting as a jurymen, and seeing what legal evidence there is brought forward, I cannot feel any doubt in saying that the plaintiff has not established that Crawter was the agent of the defendant for the purpose of entering into a contract.

[LORD ST. LEONARDS. — You think the letters are of no consequence.]

LORD WENSLEYDALE. — I think the letters are of no consequence to show original authority. There is not one of them which states original authority. They are all written in the course of the negotiation ; and I, myself, am clearly of opinion that they ought not to supply the want of evidence which there is in the case on the part of the plaintiff. These letters would be of no weight at all if Mr. Crawter had no authority, and there is nothing in the case to prove that he had authority. Therefore I am of opinion that there is certainly not sufficient evidence in this case of any authority upon the part of Crawter to make this contract.

The next question is, whether, if Mr. Crawter had authority to make the contract, he did make it. Now, I must say that I feel pretty confident also upon that part of the case. An agreement to be finally settled must comprise * all the terms * 305 which the parties intend to introduce into the agreement.

An agreement to enter into an agreement upon terms to be afterwards settled between the parties is a contradiction in terms. It is absurd to say that a man enters into an agreement till the terms of that agreement are settled. Until those terms are settled he is perfectly at liberty to retire from the bargain. Now, in this case, it is clear that from the first this was not an agreement for a lease, which lease, according to the state of the law at that time, must have been a lease by deed, but merely an agreement to enter into an agreement to be afterwards drawn up by a solicitor. Then that comes to a pure question of fact, whether the parties intended that the agreement to be so drawn up should embody what they agreed upon, and that they should not be bound till the formal agreement is entered into, or whether they meant to agree by parol, but agreeing upon all the terms first, they meant afterwards to reduce it into writing as a memorial. These cases often occur in Courts of law, and the question then always is, whether the parties mean to embody the contract, made by parol, in writing? If they do, nothing binds them till it is written. If they enter into a contract

with a view to a written agreement, nothing will bind them but that written agreement, and that quite independently of the question upon the Statute of Frauds applying to all agreements. And the plaintiff will be always nonsuited if it appears that the parties were treating upon terms, and that they meant to embody those terms in writing, whether that writing is to be signed or not.

[LORD ST. LEONARDS. — Then that puts an end to all the cases.]

LORD WENSLEYDALE. — I only state that as a proposition of law, with perhaps another qualification. If two parties * 306 * have agreed or talked together upon an agreement, and it is understood between them that that agreement is to be reduced into writing, nothing binds them but that writing. If parties agree finally to be bound by any terms, and then, for the sake of preserving a memorial, having agreed to be bound by the original terms, they get a document drawn up, there is no doubt that they are bound by the original terms, provided they are such terms as can be binding without writing, and are not void under the Statute of Frauds. The formal document is only ancillary. If the original understanding is that the terms are to be reduced into writing, and that the parties are not to be bound until the terms are reduced into writing, then each party has a right to withdraw before the agreement is signed. I apprehend I do not state a proposition of law to which my noble and learned friend will not assent.

[LORD ST. LEONARDS. — Not as you have stated it latterly.]

LORD WENSLEYDALE. — If the understanding between the parties is that they are to reduce the agreement into writing, and that they are not to be bound till it is reduced into writing, then either party may withdraw from the agreement. But if the terms are agreed upon by parol and the writing is meant to record the transaction and to preserve a memorial of it, in that case they are bound, and if it becomes essential to satisfy the Statute of Frauds, you may oblige them to sign the memorial, provided you have sufficient to bring it within the Statute of Frauds. Here the question would be simply, Did the parties mean that the attorney should draw up the agreement because they had finally agreed upon terms, and merely wanted a formal document, or were the parties negotiating for an agreement for a lease, to be drawn up by an attorney?

Now, the impression upon my mind is that this is a negotia-
* 307 tion for * an agreement for a lease, which agreement for a

lease would not at that time operate as a lease, because the law required that it should be a lease by deed for twenty-one years. The impression upon my mind is very strong that the parties understood that they were to reduce it into writing, and that it would not operate at all till it was reduced into writing. That is my strong impression, looking at the facts proved in this case. The terms were agreed upon to a certain extent, and they were sent to be drawn up by an attorney. The defendant swears that the attorney advised him on the propriety of granting this lease, and the terms were sent to him to prepare a lease that he might look over them and approve of them. Now, there was a great deal to be done before the lease was to be granted, because the terms of the lease were to be arranged. Was it not perfectly competent to the defendant to introduce into the lease a covenant relating to the user of the house, that it should not be used except as a public house, or that it should not be used as a public house? Was not it open to him to put into the lease every sort of stipulation? Then how can it be binding finally till the agreement was drawn up, specifying the terms which the lease was to contain, and introducing every thing which the parties would wish to introduce?

Then there is one other circumstance, which I own struck me very strongly (and it has not been removed either in the course of the argument or in the course of the observations of my noble and learned friend), and that is with regard to the terms of these instructions themselves. The instructions seem to show that the parties had not finally agreed and decided upon terms; they are to be found in the Instructions. [His Lordship here read the first part of the Instructions.] Is it to be supposed that the lease was to contain only these covenants? was it not to contain a * covenant to pay the rent, and other covenants of any de- * 308 scription that the attorney might think proper to introduce into that lease under the circumstances of the case? The person to draw it up was then required to send it to Messrs. Crawter, 7 Southampton Buildings.

Now that is clearly an order to the attorney to introduce a new term, viz. an obligation to lay out 600*l.*, and an instruction that the lease was not to commence until after the end of Messrs. Meux's term. It is perfectly clear that those terms were to be introduced, and there is no trace of any evidence, nor could the learned counsel in the argument suggest that there was to be found

anywhere a trace of an agreement on the part of the plaintiff to lay out 600*l.* in improvements. Therefore that satisfies me perfectly that these instructions were not the final agreement, but were merely instructions to the attorney to prepare an agreement, and to introduce those terms, and other terms that he thought necessary, and whether the plaintiff would consent to these was uncertain. It appears to me, therefore, that the case is not made out for the plaintiff.

Looking at the whole of the evidence, and giving no weight to the plaintiff's evidence when it is contradicted by that of the defendant, merely putting one in opposition to the other ; looking at the evidence of the independent witness *Crawter*, there is, in my opinion, a very strong case indeed for the defendant ; and, sitting as a Judge at *Nisi Prius*, I should put it to a jury to find a verdict for the defendant, unless they attributed to the loose expression used by the defendant to *Taylor*, a meaning which they believed to be true, that the defendant had already agreed upon a lease. That loose expression ought not, I think, to warrant the jury in coming to a conclusion against the positive evidence of *Crawter*,

which is not contradicted by any thing in the case. There-
 * 309 fore, in the first place, I come to * a conclusion very satisfactory to my own mind, that the plaintiff has not made out his case by showing authority, and, in the next place, that looking at the whole of the transaction, there was nothing whatever but an agreement for a lease, in which lease alterations might be introduced, and which it was evidently the intention of the defendant and of those acting for him, should be introduced, and in particular a clause obliging the plaintiff to lay out 600*l.*, to which it is by no means certain the plaintiff would have agreed ; therefore, the agreement is incomplete in that view of the case ; all the rest of the circumstances of this case, and the other points that have been argued are immaterial in the view I take, but I give my opinion upon this question of fact, and upon this question of fact it is not made out that there was any authority given by the defendant to make this agreement, and it is not made out that there was a binding agreement entered into.

Decree affirmed, and appeal dismissed.

Lords' Journals, 26th June, 1857.

[* MAYOR OF BEVERLEY v. ATTORNEY-GENERAL. *310

1857. July 10, 20, 24.

The MAYOR, ALDERMEN, and BURGESSES of BEVERLEY, *Appellants*.
THE ATTORNEY-GENERAL, *Respondent*.

Charity. "Overplus." Increase.

Where a testator gives for charitable purposes, to A. the whole of an estate, or all the rents of an estate, apportioning those rents, so as to exhaust them, among charitable objects, any increase in the rents must be applied to the same charitable purposes.

Where a testator gives to A. an estate or rents, in trust to make certain payments to charities, and speaks of an overplus, which he does not specifically bequeath, if there should be an increase in the profits of the estate, A. will be entitled, after making the specified payments, to take the increase.

A testator in 1652 gave an estate, which he calculated to produce 47*l.* a year, to the corporation of B., upon trust to pay certain sums, which left a residue of 7*l.* a year. He made no specific bequest of this sum, but, referring to charges which then were required for the maintenance of the army, he directed that what the mayor could not spare out of the overplus should be deducted out of the payments to some of the charitable objects of his will. These payments to the army ceased, and an increase took place in the income from the property bequeathed : —

Held, reversing the decree of the Court below, that this increase belonged to the corporation of B.

THIS was an appeal against a decree of the Master of the Rolls which had been affirmed by the Lords Justices. The question arose upon the will of the Rev. Dr. Metcalfe, who was one of the Senior Fellows of Trinity College, Cambridge. In the year 1652 he made his will, by which, after a number of other gifts, he recited that he had purchased a farm, called or known by the name of Silliards, situate in Gilden Murden, in the county of Cambridge, with certain lands, then yielding the rent of 47*l.* a year ; and he proceeded thus : " I do give and bequeath the said farm called Silliards, with all the said lands and appurtenances thereto belonging, to the Mayor, Aldermen, and Burgesses of the town of Beverley, Yorkshire, * wherein I was born, and to their * 311 successors for ever ; nevertheless in and with this trust and confidence in them reposed, that they, their successors and assigns, shall employ the yearly rent of the said farm, with the lands and

appurtenances, in manner and form following, and not otherwise, namely, that they shall well and truly pay, or cause to be paid, yearly and every year for ever, unto the preacher (as he is commonly called), or lecturer of the said town of Beverley, and his successors, the sum of 10*l.* of good and lawful money of England, and to the schoolmaster of the said town and to his successors, in like manner, the sum of 10*l.* of good and lawful money of England, and to my sister Prudence Metcalfe, now dwelling in the said town of Beverley, during her natural life, the sum of 20*l.* of good and lawful money of England, yearly and every year. And after the decease of my said sister, Prudence Metcalfe, that they shall well and truly pay, or cause to be paid, the said 20*l.*, yearly and every year for ever, unto three poor scholars of the school of Beverley (commonly called the free school), naturally born in the said town, for their better maintenance at the University of Cambridge, viz. to every one of the three poor scholars the sum of 6*l.* 13*s.* 4*d.*, the said three poor scholars to be appointed and approved from time to time by the said Mayor, Aldermen, and Burgesses, and their successors, and the lecturer and the schoolmaster of the said town and their successors. And the said maintenance to be continued to every of the said poor scholars until the time that they have taken the degree of Master of Arts, if they so long continue students in the university. And upon condition that they take the said degree at the due time, within eight years after their admission into the university. But if there be not always three poor scholars at the University of Cambridge, or ready to go

* 312 to the university, who shall stand in need of * that maintenance, and be poor men's sons, who are not able otherwise to maintain their children there (for my will is that no son of any of the aldermen, or of any other who are of sufficient ability to maintain their children at the university shall be capable of that maintenance), then I ordain that in the interim, till there shall be such poor scholar or scholars, poor men's sons, what can be spared of the said 20*l.* (no poor scholar having above 6*l.* 13*s.* 4*d.* yearly) shall be distributed amongst the poorest people of the said town, together with the money which in this my will I shall hereafter mention. Moreover, my will and desire is that so long as the taxes or rates to the commonwealth for the maintenance of soldiers shall continue, what the said Mayor, Aldermen, and Burgesses cannot spare out of the overplus of rent, viz. 7*l.* (for the farm is now,

as was formerly signified, let for 47*l.* per annum, and so hath been let heretofore), shall be deducted equally out of the 20*l.* per annum which they are to pay to their lecturer and schoolmaster, that my sister may have 20*l.* yearly and every year wholly and entirely paid unto her."

The will, after some other bequests, proceeded thus: "I give to the mayor, aldermen, and burgesses of the town of Beverley, and to their successors, the sum of 450*l.* for the purchase of so much free land as will yield yearly and every year the rent of 22*l.* 10*s.*," on trust "that they and their successors shall distribute 20*l.* of the said rent, yearly and every year for ever, among the poorest of the people of their town, upon 20th December or the day after, or as shall be thought most convenient by the mayor and lecturer of the town for the time being. And my will is that so long as the taxes and rates due to the commonwealth for maintenance of soldiers shall continue, that unless they can spare any thing out of the 50*s.* overplus, the said rates be defrayed out of the 20*l.* yearly."

* He afterwards executed a codicil, in which, mentioning *313 the gift of the 450*l.* and the purpose for which it was given, he said that he had himself purchased the land, and as it was copyhold, had "purchased a court" in order to dispose of it, "to enable me that my heirs might have nothing to do therein. And that business being despatched, my will is that that gift and legacy be disposed of according to the true intent and meaning specified" in the will.

The annual income of the property at the time of instituting the suit amounted to about 180*l.* The mayor and aldermen received the rents, and paid the 40*l.* in the manner directed by the will, and carried over the surplus to the borough fund.

In March, 1851, an information was filed, at the instance of the Attorney-General, on the report of the charity commissioners, claiming for the benefit of the charities mentioned in the will, the surplus of the rents beyond the 40*l.* a year. The question to be decided was, whether the gift was limited to 40*l.* a year, or whether the whole rents, or at least forty-fourths of those rents, were or were not appropriated to those charitable objects.

The Master of the Rolls considered that they were so appropriated, and made a decree accordingly.¹ That decree was taken by

¹ 15 Beav. 540.

way of appeal to the Lords Justices, who adopted in effect the same view as that of the Master of the Rolls,¹ Lord Justice Knight Bruce, however, saying :² " I have, after much attention to the matter, found myself unable to free my mind from doubt whether his Honour has taken the view that ought to be taken of the testator's meaning. But I doubt only. Seldom indeed, or never, have I met with a case to my apprehension of more difficulty."

* 314 * From that decree the Mayor, Aldermen, and Burgesses appealed to this House.

Mr. Lloyd and *Mr. E. K. Karlake* for the appellants. — The chief object of the testator was to benefit the town of Beverley. The application of the overplus to the borough fund effectuates that object. The gift of the estates is absolute, subject only to the payment of the sums specifically appropriated. For a time he knew that the first charges would absorb the larger portion of what he bequeathed, but after that he intended the corporation to take the surplus, and to have all the benefit of any increase in the rents and profits of the property. This case falls within the principle stated in the *Thetford School Case*,³ that as the corporation here would have to bear any loss, it is entitled to the benefit of any increase. *The Attorney-General v. Bristol*,⁴ and *Jack v. Burnett*,⁵ proceed on that principle. The payments to the soldiers could not be stated in the will ; they were levied monthly, and Scobell's Acts show that they varied considerably. The testator must have known that, and directed these payments to come out of the residue ; that residue was given as "overplus, namely, 7*l.*," to the corporation. He not only contemplated a time when that overplus would increase, but he provided for it in such a manner as to show that the mayor, aldermen, and burgesses were to have the benefit of it, for he expressly directed that the poor scholars should not have more than 6*l.* 13*s.* 4*d.* each. The excess over the gifts to them, the lecturer, and schoolmaster, would form residue which would go to the corporation.

* 315 * The circumstances of this case are the same as those of *The Attorney-General v. The Skinners' Company*,⁶ and they

¹ 6 De G., M. & G. 256.

⁵ 12 Clark & F. 812.

² 6 De G., M. & G. 263.

⁶ 2 Russ. 407.

³ 8 Rep. 130 b, ed. 1826.

⁴ 2 Jac. & W. 294 ; the deeds in that case are fully set out in 3 Madd. 319.

are not like those of *The Attorney-General v. The Drapers' Company*,¹ for there the sums stated in the will, the residue included, were fixed proportions, ascertained and settled from the first by the testator. Like *The Attorney-General v. Smythies*,² this was a gift of the whole to the Mayor and Aldermen, subject to a trust to pay thereout certain specified sums; those sums being paid, the trust is discharged, and the whole fund belongs to the corporation. *The Attorney-General v. Brazen Nose*³ proceeded on the same principle. All the cases were considered in this House in *The Mayor of Southmolton v. The Attorney-General*,⁴ but that case had not been decided here when the Master of the Rolls made his decree in this cause. He proceeded therefore on the decision of that case in the Court below,⁵ but that decision was afterwards reversed here, and it must be assumed that his Honour would have given an opposite judgment if he had anticipated that reversal.

The Attorney-General and *Mr. Terrell* for the respondent. — This case depends on the intention of the testator, which was to divide his property into certain proportions, and to distribute it in those proportions among certain ascertained persons. The testator had never been a member of the corporation, and did not entertain any partiality for it. His express exclusion of the sons of aldermen shows a feeling of an opposite kind. His design was to benefit the whole town, and that design was partly to be carried *into effect by promoting good education, and then “the * 316 poorest people” of the town were to be benefited. He gave nothing expressly to the corporation, and at the date of the will he plainly thought that the whole of what he did not specifically bequeath, and perhaps even part of what he did so bequeath, would be required for taxes. The circumstance that he parcelled out the property into aliquot proportions, giving to each party specific sums, shows that he intended each to participate in any possible increase in the same proportion. That is the principle stated by Lord St. Leonards in the *Southmolton Case*.⁶ In *The Attorney-General v. The Coopers' Company*,⁷ Lord Langdale said: “There is no dispute as to the principles on which the Court acts.

¹ 4 Beav. 67.² 2 Russ. & M. 717.³ 2 Clark & F. 295.⁴ 5 H. L. Cas. 1.⁵ 14 Beav. 357.⁶ 5 H. L. Cas. 32.⁷ 3 Beav. 29.

in cases of this kind. If the testator clearly declares an intention of devoting the whole income of a property to charitable purposes, then, although he does not in specifically directing the application of portions of it exhaust the whole income, still the general intention that the whole shall be applied to charitable purposes will prevail; and on the other hand, although he does not make any such general declaration of devoting the whole to charity, but gives each and every portion of the whole income at the time to some charitable purposes, and by that means exhausts the whole, then, if the income should afterwards increase, the increase will be applicable to charitable purposes." Applying that principle to the present case, the whole of the income here must be treated as devoted to charities. Here the testator first specified what was the amount of the rent, then he divided it, and finally fixed the surplus at 7*l.*, showing that he had got the proportions in his own

mind and meant the whole sum to be divided according to *317 those *proportions. In *The Attorney-General v. Caius College*,¹ such a circumstance was held conclusively to indicate the testator's intention. In the *Southmolton Case*,² an express benefit was given to the corporation. So in *The Attorney-General v. The Skinners' Company*.³ There is nothing of the sort here. In *The Attorney-General v. The Corporation of Bristol*,⁴ there was a covenant on the part of the corporation which imposed on it an obligation, the performance of which might subject it to loss. There is no such covenant here. On the contrary, the testator when he thought that the charges which he imposed on the residue might be more than the residue, expressly declared who was to pay the difference; it was to be paid by the lecturer and schoolmaster, but not by the corporation. *The Attorney-General v. The Skinners' Company*⁵ is distinguishable from the present case, for there the ultimate gift of the overplus was to the company. There is here no specific gift of the overplus. The limitation in the gift to the poor scholars here was not for the benefit of the corporation, but for the poor of the town, and the whole will shows they, and not the mayor and aldermen, were the objects of his bounty.

¹ 2 Keen, 150.

² 5 H. L. Cas. 1.

⁵ 2 Russ. 407.

³ 2 Russ. 407.

⁴ 2 Jac. & W. 294. See the deeds set out, 3 Madd. 319.

THE LORD CHANCELLOR, after fully stating the circumstances, said: My Lords, the general rule in these cases is one well known; it has been established since the time of Lord Coke, and is generally referred to as the doctrine that was established in the *Thetford School Case*.¹ In that case the testator having land let at a rent of 35*l.* a year, bequeathed a sum of 35*l.* a year "to the charitable uses * hereinafter mentioned, that is to say," * 318 and then he said to the schoolmaster so much, to the usher so much, proportions of the whole. In process of time the estate became much more valuable, and the rents much larger than 35*l.* a year. The question was, who was entitled to that surplus? and what was decided in the *Thetford School Case* was that the whole was appropriated to charity, upon the well-known principle that if I gave all the rents of my estate for ever, I in truth give my estate; so that that was a gift of the estate to charity, and an apportionment of it in the mode that he had mentioned.

That doctrine has never been questioned. It was acted upon afterwards in many cases, and in one case particularly, *The Attorney-General v. Johnson*,² in the time of Lord Hardwicke, and the doctrine is not controverted.

So again there have been cases of this sort, where a testator has expressed in his will that he intends to devote the whole of some particular property to charity, and then has gone on to say, that is to say, so much to such a charity, and so much to another, but not so as to exhaust the whole. There the Court has fastened upon the intention expressed in the beginning of the bequest, to give the whole to charity, and although the testator has not apportioned the whole to charity, yet according to the jurisdiction exercised by the Court, its well-known jurisdiction to make a scheme for charity, it has devoted the whole to charity. That was the doctrine acted upon in the case of *Arnold v. The Attorney-General*, which was finally affirmed in this House.³ Now, those doctrines are doctrines not to be controverted, that if a testator gives the whole of his estate to charity, apportioning the rents, such as they are, amongst the different charitable objects, if those rents increase the increase * must go in the propor- * 319 tions in which the testator had given the original rents. So if a testator declares his intention to give the whole to charity,

¹ 8 Rep. 130 *b*, ed. 1826.

³ Show. P. C. 22.

² Amb. 190.

but specifically appropriates only a certain part, still the general intention in favour of charity prevails, and the proportion not appropriated by him will be appropriated by the Court of Chancery to charity.

Now those are the general rules, which have been acted upon for so long a period that it would be extremely dangerous and impolitic to enter into any question as to whether they were in their inception founded in very good sense or not. Many of the most eminent judges from time to time have pointed out that if the doctrine, which we are now familiar with, of resulting trusts had been understood in those days as it is understood now, in all probability that construction of those devises or bequests would never have been adopted, because it is a well-known rule of law that the heir at law is not to be disinherited of any thing that would come by descent to him, unless by express words or necessary implication. And Lord Hardwicke and Lord Eldon both intimated their strong opinion that if the question was now untouched by decisions, if a testator gave only 85*l.* a year to charity, and afterwards the estate became more valuable than 35*l.* a year, the right of the heir at law would not be affected. I do not, however, propose now at all to question that general doctrine; whether rightly or wrongly established in its origin, the doctrine is now established, and it would be very improper to depart from it.

But Lord Eldon remarked in a case that came before him in investigating this matter, in which he gave a judgment which has been almost the foundation of all our reasoning on this subject since, *The Attorney-General v. The Mayor of Bristol*,¹ that * 320 after all, this question must in * each case be looked at as one of construction, in order to see what is the fair inference to be deduced from the will of the testator. There may be circumstances in the case to show that the general doctrine is not applicable. Lord Eldon says, in *The Attorney-General v. The Mayor of Bristol*, "As far as I have read these ancient cases," and it seems he had quite exhausted the subject by reading them all, "they state it to depend upon the intention of the donor, and that one way of finding out that intention is, to inquire whether the whole of the annual value of the property was at the time of the foundation of the charity distributed amongst the objects of the charity. If it was, they say that that circumstance is evidence of

¹ 2 Jac. & W. 294.

the donor's intention to give the whole of the increased value to the same object." The same doctrine was adopted by your Lordships' House in a case to which I shall presently call your attention, *The Mercers' Company v. The Attorney-General*,¹ and which came before this House soon after Lord Lyndhurst had received the Great Seal, in 1827 or 1828.

All these cases to which I have referred, in which the doctrine has been applied, are cases where the whole property has been given to charity. Up to a very recent period I have been unable to discover any case in which that doctrine has been applied where there was known by the testator to be any surplus of which he had not expressly or impliedly disposed. Lord Eldon remarked in the *Bristol Case*: "If I give an estate to trustees, and take notice that the payments are less than the amount of the rents, no case has gone so far as to say that the *cestui que trust*, even in the case of a charity, is entitled to the surplus."

In the case of *The Attorney-General and The Skinners' Company*,² a case which came before Lord Eldon just * before * 321 he finally gave up the Great Seal, he remarks the same thing. He says: "The Court has inferred from very slight circumstances that a testator did mean to give the whole of an estate to charitable uses; but I can find no case in which the Court has said that, if it appears on the face of a will that the testator knew that the value of his estate was or might be more than the amount of what he had given in parcelling out the disposition of sums to charity, it was authorised to hold that such particular disponees should take the whole, though an intention to give them the whole did not appear on the face of the will; still less is there any authority for saying that in such a will as this, a general disposition, such as is contained here, would not dispose of the whole surplus to the final devisee."

That is quite consistent with the view taken of the law by this House in the case to which I have already adverted, of *The Mercers' Company v. The Attorney-General*,³ which was decided in the year 1828. That was a case in which a party by deed made this bequest: "Touching the yearly rent of 150*l.* reserved upon a lease theretofore made of the same by Sir Thomas Bennett unto Skelton, for the term of forty-one years from Lady day then next

¹ 2 Bligh, N. S. 165.

² 2 Bligh, N. S. 165.

³ 2 Russ. 407.

coming, and touching all other rents, issues, and profits of the same premises," he directs, amongst other things, "that the parties of the second part should permit the said Sir Thomas Bennett to receive the rents until Lady day then next, and should from thenceforth receive the said yearly rent of 150*l.*, and all other rents and issues thereof, and yearly pay and deliver the monies arising thereupon to the wardens of the Mystery of Mercers of the city of London and their successors, or such one of them

* 322 as the *said company should appoint and be answerable for, and that the said wardens and commonalty should, from the said Lady day, dispose of all the said monies so from time to time to be paid and delivered as aforesaid to the uses following, viz." Then he enumerates a great number of charities, as amounting in the whole to 150*l.*, but they amounted in fact only to 149*l.* 11*s.*, instead of 150*l.* A proceeding was instituted by the Attorney-General in the Court of Exchequer, for the purpose of having it declared that the increase of those rents was to go to charity and not to the Mercers' Company; and by the decree of the Court of Exchequer that doctrine which was maintained by the Attorney-General was affirmed; but the decree ended thus:¹ "Without prejudice nevertheless to the question how far the appellants were entitled to partake of or share in the said increased or augmented rents, with reference to their share or benefit in the said original rent of 150*l.* given to the appellants by the deed of the 17th of January, 1616"; that is, whether they were or were not entitled to any portion of the increased rents in respect of the 9*s.* out of the 150*l.*; whether that had come to them under the original trust as not having been disposed of by the will.

My Lords, that question was very fully argued at your Lordships' bar when the case was brought here on appeal; and Lord Lyndhurst, who held the Great Seal, in moving the judgment of the House, goes very fully into the question. He says:² "The case of *The Attorney-General v. The Mayor and Corporation of Bristol* was referred to for the purpose of establishing this position. Now, the only principle established, or rather confirmed, by that case was, that where there is a surplus under circumstances

* 323 * similar to the present, that is, where there is an annual sum granted, and a part of that annual sum only is appro-

¹ 2 Bligh, N. S. 175.

² 2 Bligh, N. S. 178.

priated to special objects, and there is a residue which the trustees hold, that is evidence of the intention of the donor that the surplus rent should belong to the persons to whom this property is in the first instance conveyed ; but it is only evidence of the intention ; it is liable to be repelled by any other evidence arising out of the instrument upon which that fact appears. It is quite obvious that if it is made use of merely as evidence of the intention of the donor, something must depend upon the amount of the sum ; and surely no very strong evidence of intention can arise out of an instrument of this kind, where it appears that the whole sum at that period amounted to 150*l.* a year, which is applied to a great number of special objects, and that the only balance remaining unappropriated is the fractional sum of 9*s.* No very strong evidence of intention can arise from a circumstance of that description, that it was the intention of the donor that any surplus funds at any future time, however large, should become the property of the Mercers' Company. Whatever slight inference of intention may arise from the omission to appropriate that small fractional sum, is repelled by the very strong terms in the former part of the deed, in which it is expressed, not only that the existing rent of 150*l.* a year, but all the rents should be received by the trustees, and handed over to the Mercers' Company ; and the Mercers' Company are directed to apply, not the present rents only, but all the rents, to the purposes of the will." His Lordship therefore stated, that he thought the doctrine laid down in the *Thetford School Case* was applicable, and he so held. He gave no opinion whatever upon whether there was any foundation for that which was, at all events, the reservation made in the decree of the Court of Exchequer, as to the question * whether the Mercers' Company was or was not * 324. entitled to any thing in respect of the 9*s.* ; substantially he gave the whole to charity.

Now, my Lords, up to that period of time I cannot find any instance where there has been any suggestion made that if there is a surplus the donees or devisees, as the case may be, are to take that surplus for their own benefit. The doctrine of the *Thetford School Case* is applicable to show that the owners of the surplus are to come in with the charities, and to take in proportion ; that is to say, applying it to this case, that for all time to come the property is to be divided into forty-seven parts, and that forty forty-seventh parts are to belong to the donees of the property, and

seven forty-sevenths to the corporation. In the first place, I think that the improbability is extremely great that a testator when he leaves a surplus to parties who are to make the payments, could possibly intend that that surplus should bear an invariable proportion to that which the charities were to take. It is, in fact, hardly a rational intention.

The only cases in which that doctrine has been so applied, so far as I can ascertain, are two cases before the late Lord Langdale, *The Attorney-General v. The Coopers' Company*,¹ and *The Attorney-General v. The Drapers' Company*. In the first of those cases there was something extremely singular in the bequest; it is not at all clear to my mind that the ultimate surplus was not given to charity just as much as the other sums. It was a devise of houses, which the testator noticed were let for 11*l.* a year, and then he apportioned 8*l.* a year in very small sums, indeed in shillings each,

to a great number of petty charities, and he noticed that
 * 325 there was a *surplus of 3*l.*, which he gave to the Coopers'

Company, to be disposed of as they thought fit, but subject to charges, and to the obligation to keep the premises in repair, and so on. Lord Langdale held that the surplus given to the Coopers' Company was to vary just in proportion as all the other sums given to charities were to vary. If that can be justified, I confess I think that it can be justified only upon the ground that, though this was called a surplus, it was a proportion of the whole sum, and therefore the Coopers' Company was to take its proportion just as if it had been in the nature of a charitable bequest, although it was not strictly a charitable bequest. However, that case is not under review now. Whether I should have come to that conclusion or not it is not necessary for me to determine.

The next case was the case of *The Attorney-General v. The Drapers' Company*.² Now if the doctrine to which I have referred of surplus was ever to be applied to any case it was certainly to be applied to that case, because what the testator did there was this, he directed that lands were to be purchased of the annual value of 100*l.*, and then he apportioned 96*l.* among charities; and as to the remaining 4*l.*, he said: "The residue of the said sum of 100*l.* a year (being 4*l.* yearly) for ever, I entreat the four wardens of the Drapers' Company to accept for their pains, to be equally divided between them." They were held entitled rateably to the increase.

¹ 3 Beav. 29.

² 4 Beav. 67.

Now, if those persons could be treated as coming within the description of charitable objects, then it would be exactly the *Thetford School Case*. If they could not be so treated, if they are merely to be treated as personal devisees, intended to be personally benefited, I can only say that I do not think any of the prior cases warrant that decision.

* The truth is, looking back to what was said by Lord * 326 Eldon, each case, when we have to apply this doctrine, must stand upon its own ground ; we must look at the whole context of the instrument, and see whether, when the surplus is given, we can infer, from the mode in which it is given, or from any other circumstances, that what is given is surplus, taking the *prima facie* meaning of the expression "surplus," whatever it may amount to, or whether it is meant to be only an aliquot proportion of the whole, and to abate rateably with the proportion given to charities. Now, applying myself therefore to the investigation of the question with reference to this particular will, in spite of the high authority in this case sanctioning the decision of the Master of the Rolls, himself a very high authority (the Lord Justice Turner certainly taking the same view as the Master of the Rolls, and Lord Justice Knight Bruce at all events not dissenting from it), I must say that I have, after attending to the case very carefully, come to the conclusion that this was an erroneous decision.

I cannot conceive that the testator here meant to use the word "overplus" in other than its *prima facie* and ordinary meaning. It was admitted in the argument that that must have been the meaning, if he had not said, as he does say, that the overplus was 7*l*. If, after having apportioned the 40*l*. a year amongst the different objects of charity, he had simply said that he gave the surplus to the Corporation of Beverley, nobody would have argued that the surplus would not mean the surplus, whatever it might amount to. How is that varied by the fact of his having noticed that the estate would let for 47*l*. a year, and that afterwards, in speaking of the surplus, or overplus of rent, he says : " viz. 7*l*., the farm being let for 47*l*." I will not say that the circumstance of his mentioning the 7*l*. is to have no influence whatever, but I think it is a * circumstance infinitely more than counterbalanced by * 327 other considerations arising upon the face of this will. In the first place, I think it is quite clear that if the rents had fallen off the charities would not have abated so long as there were 40*l*.

a year received from the estate, and the mention of the 7*l.* is not to be treated, at all events, as a strong argument to show that the doctrine laid down as to surplus applies to this case.

But here we find that 20*l.* out of the 40*l.* are given to three poor scholars. If there are not three poor scholars, what is not wanted for the poor scholars is to go to the poor of the town of Beverley. If there are three poor scholars nothing is to go to the poor of the town. And the testator expressly says that no poor scholar is ever to have more than 6*l.* 13*s.* 4*d.* per annum; if no poor scholar is to have more than 6*l.* 13*s.* 4*d.* per annum, and there was no falling off in the rents, but the rents had increased, you cannot say that those charities were to increase in a rateable proportion, because the testator has expressly told you that they are not to do so. It is obvious, therefore, if that state of circumstances had arisen, the rateable proportion in respect of the poor scholars could not have been increased.

But further, it is to be observed that during the life of the testator's sister Prudence, 20*l.* a year were given to her. I am not speaking now of a charitable bequest. I know of no principle or authority for saying that gifts of this sort, gifts not to charitable objects, are to increase or diminish rateably. Supposing the rents had fallen off from 47*l.* a year to 45*l.* a year, or that the taxes had exhausted the 5*l.* a year, would it be an arguable proposition that the Mayor and Corporation of Beverley were not bound to pay the 20*l.* a year to the sister? It appears to me most clear that

* 328 she must have had her 20*l.* * a year; and that being so, the doctrine of the *Thetford School Case*, in the state of circumstances which might have arisen, would not have been applicable.

My Lords, upon these grounds, attending very carefully to the whole case, my clear opinion is that this case is governed by the *Southmolton Case*,¹ and that the surplus is to go as in that case it went, whether it be more or whether it be less, to the parties who are to make the payments. In deciding this case, the Master of the Rolls proceeded upon the doctrine of the *Southmolton Case*, which had not then been finally decided in your Lordships' House, although undoubtedly he might, perhaps, have distinguished the two cases. And I find that when the case was brought to the attention of the Lords Justices, they thought it might be distinguished. I have been unable to distinguish it. I think all at-

¹ 5 H. L. Cas. 1.

tempts to make refined distinctions between cases which are the same in principle are mischievous, and tend ultimately to litigation, which does no good to anybody. I take the great principle to be, that when a testator makes a bequest to certain parties who are meant to be benefited by him, upon whom he has imposed the duty of paying certain sums to charities, and he gives the surplus to them, in using the word "surplus" or "overplus," he uses it in its *primâ facie* meaning, be it more or less. And I find nothing to induce me to think that that principle is not applicable to the present case; and therefore I think that the information ought to be dismissed, and that the decree of the Master of the Rolls ought to be reversed, and I shall so move your Lordships.

LORD BROUGHAM. — My Lords, I come to the same conclusion as my noble and learned friend, after having entertained some doubts * in the earlier part of the argument at the * 329 bar, doubts much confirmed by the difference of opinion among the learned Judges below; because although no difference between the two learned Lords Justices finally occurred, yet I think it is perfectly manifest that Lord Justice Knight Bruce only concurred upon the ground that there being only two Judges, and the Master of the Rolls and Lord Justice Turner having agreed, if he had differed in opinion from his learned colleague Lord Justice Turner, there must still have been an affirmance, as of necessity, of the decree appealed from of the Master of the Rolls. I certainly more than agree in the doubts expressed by Lord Justice Bruce. I agree with my noble and learned friend in thinking that this decree of the Master of the Rolls was erroneous, and for the reasons which my noble and learned friend has given.

There is no doubt that the two propositions, the principle recognised in the *Thetford School Case*, and the principle recognised in the case of *Arnold v. The Attorney-General*,¹ are perfectly identical. The *Thetford School Case* proceeded upon this ground, that you gather from the manner in which the bequest has been made of the whole income to charity, without any reference whatever to any surplus, that there is the intention of giving the whole estate. My noble and learned friend well observed, if there was an estate in fee, and if a party gives to A. B. the whole rents and profits of

¹ Show. P. C. 22.

that estate, that fee continuing of the same value as at the time of the gift, or being increased or diminished hereafter, according to the principle in the *Thetford School Case*, upon the inference that from the gift of the whole rents and profits to charity, the charity is to have the whole estate, though it increased ever so much afterwards.

* 330 *Then the other case referred to is precisely the same in principle; it is this, that when an estate is by the gift stated to be given generally to certain parties individually, or to certain persons in succession, for the benefit of charities, the result of that will be that the whole is to be taken as appropriated to charity.

But the question is, whether these principles apply to a case of this sort? and what Lord Eldon has said in the celebrated case of *The Attorney-General v. The Corporation of Bristol*,¹ is no doubt perfectly true, that whatever principle is to be gathered from those cases, every thing depends upon the application of the principles to the circumstances of the particular case in which they are applied. Many persons have lamented that the rules of construction should vary; that when the principles have been thus established, which in reality are to govern the Judges to whom the facts of the case are presented, there should be any variance in the inference that they are to draw from the circumstances of those cases. I do not quite go along with this complaint, for I think there is a great convenience in the establishment of certain principles, even though they are not universally applicable, but ought to be most carefully confined to cases in which there can be no doubt of their application. The principle in the great majority of cases, in 999 out of every 1000, is applicable, and there can be no doubt about its application.

Now, here we have a surplus in the contemplation of the giver, Dr. Metcalfe; he evidently contemplates a surplus. And then the two grounds upon which I form my opinion that the decision below is erroneous, and ought therefore to be reversed, are those which were referred to in the latter part of the judgment of my noble and learned friend, the limited gift of 6*l.* 13*s.* 4*d.* to
 * 331 each of *the poor scholars, and the 20*l.* to his sister. I think that those two gifts throw very great light upon the real intention of the giver; and looking to those two gifts, it would

¹ 2 Jac. & W. 294.

be very difficult to say that he had intended that the whole should be given to charity.

I do not go into the question arising upon the cases of *The Attorney-General v. The Coupers' Company*,¹ and *The Attorney-General v. The Drapers' Company*,² for the reasons assigned by my noble and learned friend.

With respect to the *Southmolton Case*,³ I am strongly inclined to think that it is not only not inconsistent, but agrees with the view which my noble and learned friend has expressed. I therefore entirely concur with him in thinking that in this case the decree ought to be reversed.

LORD WENSLEYDALE. — My Lords, I am entirely of the same opinion with my noble and learned friends who have preceded me. I think that in this case the judgment of the Lords Justices ought to be reversed. There is no question whatever with respect to the principle of law which ought to be applied to the case. My noble and learned friend has explained the law laid down in the *Thetford School Case*, and afterwards in the case of *The Attorney-General v. The Mayor of Bristol*, and the other cases to which he has referred. There is no question at all that if a testator or a donor gives the whole rents of an estate to charity, all the improved rents must go to charity also. And if, according to the doctrine of the *Thetford School Case*, he apports all the rents amongst all the charitable objects existing at the time of his gift, although he makes no express declaration * that the surplus shall be appropri- * 332 ated to charity, the surplus rents must be divided in the same way. And if he leaves surplus rents to those persons who are to administer the fund, those surplus rents are not to go to charity, but to be for the benefit of the persons to whom he leaves them.

Therefore this question resolves itself purely into a question of construction. Now, the Court below, I think I may say, differed in opinion; the Master of the Rolls, who first had this subject before him, having decided this case upon the first decision in the *Southmolton Case*, thought the same point which had been there decided was involved here: he had decided in that case that a division ought to take place of the rents according to the propor-

¹ 3 Beav. 29.

² 5 H. L. Cas. 1.

³ 4 Beav. 67.

tion noticed in the will. That decision of the Master of the Rolls in the *Southmolton Case* was afterwards reversed by this House, but, before the reversal, the Master of the Rolls had considered this case, and he had acted upon the authority of *The Attorney-General v. Southmolton*, which he had previously decided.

Then the question came after the reversal of that decision before the Lords Justices, consisting of Lord Justice Knight Bruce and Lord Justice Turner. Lord Justice Knight Bruce evidently considered that if this matter had come before him *de novo*, he must decide that the corporation was entitled to the surplus in this case, and that no apportionment ought to take place of the rents. But he expressed himself in this way, that he did not think so strongly upon the subject as to be prepared to overrule the previous decision. I rather think that he rated too highly the effect of the previous decision. I take it to be perfectly clear that when a Court of error is considering a former decision on appeal, that decision is

not to be overturned, unless the Court of error is perfectly
 * 333 satisfied that the * decision is wrong. *Prima facie* it is to be considered a right decision, and it is not to be deprived of its effect, unless it is clearly proved to the satisfaction of the Judge that that decision is wrong; but he must consider the whole circumstances together, and if he still feels satisfied, upon the whole of the case, that the decision is wrong, he ought undoubtedly to overturn it; it is only to be considered as *prima facie* right. The *onus probandi* lies upon the opposite party to show that it is wrong, and if he satisfies the conscience of the Judge that it is wrong, it ought to be reversed. Now, I cannot help thinking that it is perfectly clear, from what was passing in Lord Justice Knight Bruce's mind, that he would have decided differently if the case had not been decided before. I think he rather rated too highly what was necessary to be shown, in order to induce him to reverse the decision, therefore I do not attribute quite so much effect to his judgment as I otherwise should have done. It is perfectly clear, I think, that if the case had been originally before him he would have differed in opinion from Lord Justice Turner.

Then with respect to Lord Justice Turner's opinion, the question simply becomes a question of construction upon the whole of the instrument. I think very little light can be derived from other cases, — each instrument is to be construed by itself, — you are to

look at the whole of the instrument, and to put what you consider a reasonable construction upon it, according to the natural and ordinary sense of the words. I have then to look at this instrument, and to see whether, taking it altogether, I can discover from it a clear intention on the part of the testator that the rents should be divided in certain proportions, and given to the different objects of his bounty in those proportions. I confess I cannot discover that there is any intention to do more than to give to them the sums he specifies. With respect to the estate of Silliards, he says he has bought that for * the sum of "840*l.*, besides * 334 other necessary charges, yielding a yearly rent of 47*l.*," and then he says: "I give and bequeath the same farm called Silliards, with all the said lands and appurtenances thereto belonging, to the mayor, aldermen, and burgesses of the town of Beverley; nevertheless, with this trust and confidence in them reposed, that they and their successors shall employ the yearly rent of the said farm, with the lands and appurtenances, in the manner and form following: that they shall well and truly pay, or cause to be paid, yearly and every year for ever, unto the preacher (as he is commonly called) or lecturer of the town of Beverley, and his successors," not ten forty-sevenths, or any proportion of the total sum the corporation would receive, but "the sum of 10*l.* of good and lawful money of England; and to the schoolmaster of the same town, and his successors, in like manner, the sum of 10*l.*, and to sister Prudence the sum of 20*l.*, and after her decease that they shall well and truly pay the said 20*l.* unto three poor scholars of the school of Beverley." Those are therefore bequests of 10*l.*, 10*l.*, and 20*l.*, and then he comes to deal with the surplus, and he says: "Moreover my will is, that so long as the taxes or rates to the commonwealth for the maintenance of soldiers shall continue, what the said mayor, aldermen, and burgesses cannot spare out of the overplus of rent, viz. 7*l.* (for the farm is now, as was formerly signified, let for 47*l.* per annum, and so hath been let heretofore), shall be deducted equally out of the 20*l.* per annum which they are to pay to their lecturer and schoolmaster, that my sister may have 20*l.* yearly, and every year, wholly and entirely paid unto her.

Therefore, he clearly gives the surplus to the corporation, and he clearly gives it to the corporation not affected by any charitable object. It is obvious, that out of that surplus they are to pay the

expenses of collecting the rents, they are to pay all the * 335 taxes upon the property ; and he * also intimates, that inas-
 much as the charge upon them for the maintenance of sol-
 diers is very likely to exceed the surplus of 7*l.*, if that should
 happen, it is to be taken out of other sums given to the school-
 master and the clergyman, and not at all to affect the 20*l.* which
 he has given to his sister. I take it that that is clearly a direction
 that the surplus is to go to them, and that the reason why he
 mentions 7*l.* is 'on account of the probable charges which there
 would be upon the estate in respect of contributions necessary at
 that time for soldiers. He expresses a doubt whether they, having
 to pay for the repairs of the estate and the charges of collection,
 the balance of the sum of 7*l.* would be sufficient to pay the charges
 in respect of the contributions for soldiers, and if it is insufficient,
 he directs that the sum should be deducted from the sums payable
 to the schoolmaster and the clergyman, his sister's 20*l.* remaining
 unaffected. Therefore it seems to me very clear, upon the true
 construction of this instrument, that the surplus is left to the cor-
 poration. Looking at the whole case together, I cannot say that
 there appears to me to be any intention upon the part of the testa-
 tor to divide this estate into forty-seven parts, and to give ten of
 them to one object and ten to another, and twenty to his sister,
 and only seven to the corporation. It seems to me that this will
 very clearly gives them the surplus, and in my mind it is by
 no means made out that the surplus is to be reduced from the
 entire surplus of the whole rent to a proportion of seven forty-
 sevenths of the whole, and I think, therefore, that this decision is
 wrong.

There is one part of this case which struck me when the argu-
 ment was going on as throwing some light upon the question,
 whether these sums were to be fixed sums, or to abate rateably,
 that is the clause which has been mentioned by my noble and
 learned friends as regards three poor scholars ; but, on con-
 sidering that clause, I do not * think it warrants the infer-
 ence that he did not mean that the 20*l.* which he specifically
 means was to be always 20*l.*, because this is a provision for a tem-
 porary purpose in case they should not be able to discover a suf-
 ficient number of poor scholars to be the objects of his bounty ;
 and, in that case, he makes a provision as to what is to be done, he
 says : " But if there be not always three poor scholars at the Uni-

versity of Cambridge, or ready to go to the university, who shall stand in need of that maintenance, and be poor men's sons, who are not able otherwise to maintain their children (for my will is, that no son of any of the aldermen, or of any other who are of sufficient ability to maintain their children at the university, shall be capable of that maintenance)." If there were not three poor scholars who were to divide the 20*l.*, he says that one or more, being less than three, are not to receive any larger sum; the balance is not to be distributed amongst them, but each poor scholar is to receive 6*l.* 13*s.* 4*d.* only, and the rest of that 20*l.* is to be distributed among poor persons of the town. Therefore, though at first sight it struck me that that was a strong circumstance to show that he always meant the 20*l.* to be fixed, it does not, to my mind, upon considering it, prove that at all; it only shows that, in certain events, where there were not three poor scholars to go to the university, they should not divide the whole money (20*l.*), but that the surplus should be given to the poor people of the town of Beverley.

My conclusion, therefore, is that this division of the property into forty-sevenths is not authorised by the will. The testator clearly meant to give a fixed sum to the poor scholars, to the school-master, and to the clergyman, and to his sister, and he clearly intends that the surplus, whatever it was (which he calculates would probably not be sufficient to meet the charges upon it in respect to the contribution for soldiers' maintenance), should at all events go to * the mayor and corporation; therefore this is * 387 a case in which, under that part of the will, it seems to me that they are entitled to the whole of the surplus.

Then, with respect to the Over estate, the will is a little different, but in substance it comes to the same thing. The Over estate has to be divided into forty-five parts, and although the words are not quite so clear, it seems to me that the division of the surplus also of the Over estate, as well as Silliards estate, is meant to go to the corporation. I cannot find any intention to divide the surplus into aliquot parts in proportion to the charges, and therefore I think that the judgment in this respect ought to be reversed. The question in this case purely depends upon the construction of the instrument, as to which persons may very well differ; but in the view which I take of this subject, it seems to me that the true construction of this instrument is that the charges are fixed. The surplus he calculates in the one case at 7*l.*, and in the other case

he does not limit the surplus to any sum ; and that mention of the surplus of 7*l.* was nothing more than an expression of his expectation, in order to justify his casting the charges of providing for the soldiers upon the other objects of his bounty. I think, therefore, that upon these grounds, the judgment of the Court below ought to be reversed.

Decrees reversed, and cause remitted to the Court of Chancery, with a declaration that the information ought to have been dismissed.

Lords' Journals, 24th July, 1857.

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*PHILPOTT v. ST. GEORGE'S HOSPITAL.

1857. July 20, 21, 23, 24.

The REV. THOMAS PHILPOTT,	<i>Appellant.</i>
The PRESIDENT and GOVERNORS of ST. GEORGE'S	} <i>Respondents.</i>
HOSPITAL and others,	

Et e contrâ.

THE ATTORNEY-GENERAL,	<i>Appellant.</i>
THE REV. T. PHILPOTT and others,	<i>Respondents.</i>

Will. Charity. Mortmain. Prohibitory Statutes. Costs.

The 9 Geo. 2, c. 36 (the Mortmain Act), is a prohibitory, not a penal statute. Prohibitory statutes must not be interpreted on a principle of tendency ; if any thing done is substantially that which is prohibited, the thing is void, not because of its tendency, but because it is within the true construction of the statute, the thing prohibited.¹

B. devised to S. a piece of land in N. ; B. then declared his desire to erect and endow almshouses in N., and he empowered his trustees "so soon as land in N. shall have been legally dedicated to charitable uses" by some other person within twelve months after his decease, to pay to the trustees of the intended charity a sum of 60,000*l.*, to be devoted to the purposes of the charity, but not to be applied to the purchase of lands for the same : —

Held, reversing the decision of the Master of the Rolls, that this bequest was not void under the Mortmain Act.

As there was no question of construction occasioned by the obscurity of the will itself, the costs were ordered to come out of the fund bequeathed.

¹ Jeffries v. Alexander, 8 H. L. Cas. 608 ; Hall v. Warren, 9 H. L. Cas. 420.

THIS was an appeal against two decrees of the Master of the Rolls in suits instituted to declare and carry into effect the will of the Right Hon. Reginald John Pindar, Earl Beauchamp.

This will was dated on the 18th June, 1847, and after another devise, not necessary to be referred to, gave and devised "all that piece or parcel of pasture land, situate, &c. in the hamlet of Newland, in the county of Worcester," to "Charles Grantham Scott, his heirs and assigns, for ever." The will then proceeded as follows: "And whereas I have contemplated erecting and endowing almshouses either upon some part of my estate or elsewhere * in the hamlet of Newland aforesaid, for the resi- * 339 dence of twelve or some larger number of poor men and women, members of the Church of England, who shall have been employed in agriculture, and have been reduced by sickness, misfortune, or infirmity, now, in case I happen to die without effecting such object, and any persons or person should within twelve months after my decease, at their, his, or her expense, purchase or give a suitable piece of land in Newland aforesaid, as a site for such almshouses, and, with intent that the same should be devoted to such purpose, then I empower and direct the trustees or trustee for the time being of this my will, when and so soon as such land shall have been legally dedicated to charitable uses, provided they, he, or she shall approve the scheme of the intended charity, and the rules and regulations proposed for the government thereof, to pay to the trustees of the said intended charity, out of such part of my personal estate as is hereinafter mentioned, the sum of 60,000*l.*, to be by them devoted to the several purposes of the said charity in the manner to be determined in respect of the funds of the same; but so, nevertheless, that the said sum or any part thereof shall not be applied in or towards the purchase of any lands for the purposes of the said charity; and if, and in case no such piece or parcel of land shall be found and provided as aforesaid, or being such, the scheme of the intended charity, or the rules and regulations for the government thereof shall not, in the opinion of the majority of my said trustees, be in accordance with what they may consider my wishes upon the subject to have been, then I give and bequeath the said sum of 60,000*l.* to the trustees for the time being of St. George's Hospital, situate at Hyde Park Corner, in the county of Middlesex, to be by them applied to the purposes of that institution."

* 340 * The testator appointed C. G. Scott, Susan Kitching, and the Rev. T. Philpott, executors and executrix of his will, and died 22d January, 1853, leaving pure personalty more than sufficient to satisfy the legacy in question.

By an indenture dated the 6th December, 1853, and made between Charles Grantham Scott, on the one part, and John Abel Smith, Susan Kitching, and the Rev. Thomas Philpott, of the other part, duly executed and enrolled in Chancery, after reciting the material parts of the will of Earl Beauchamp relative to the charity, and that C. G. Scott was desirous of effectuating the object contemplated by the testator, it was witnessed that C. G. Scott, for a nominal consideration, did grant and convey unto John Abel Smith, Susan Kitching, and the Rev. Thomas Philpott, and their heirs and assigns, all that piece of pasture land in Newland, in the will described, to hold to them, their heirs and assigns, for ever. Nevertheless, upon trust and to the intent that the same piece of land and hereditaments should thenceforth be devoted to the purposes, and be used as a site for the erection of such almshouses, as in the will mentioned, and other the purposes of the said intended charity; and that the same should be used and enjoyed for those purposes, and be subject to such powers and provisions in relation thereto; and that the scheme of the said intended charity, and the rules and regulations for the government thereof, should be framed and settled in such manner in all respects as the trustees for the time being of the now stating indenture should, with the approbation of the trustees for the time being of the testator's will, thereafter determine, and should by any indenture executed by them, and enrolled in Chancery, direct and declare accordingly.

By an Act, 4 & 5 Wm. 4, c. 38, "The President, Vice-Presidents, Treasurers, and Governors of St. George's * 341 * Hospital" are made a body corporate, and by that name have perpetual succession and a common seal, and are made capable to obtain and hold, for the purpose of the institution, any monies and other personal estate and property of what nature or kind soever.

Various conflicting claims have arisen in respect of the sum of 60,000*l.*, the appellant, on 3d June, 1854, filed his bill against the respondents, praying that the rights and interests of all parties under the will in respect of the said sum might be ascertained

and declared, and that the trusts of the said will might be carried into effect so far as the same related thereto.

The President and Governors of St George's Hospital, by their answer, claimed the said sum of 60,000*l.* by virtue of the will, notwithstanding the execution of the indenture of the 6th December, 1853, and submitted that if such indenture had been executed and enrolled as before mentioned, nevertheless the land comprised therein had not been thereby legally dedicated to charitable uses.

The cause came on to be heard before the Master of the Rolls, who, by a decree made on the 19th November, 1855, adjudged and declared that the bequest contained in the will of Earl Beauchamp was void as regards the almshouses mentioned therein, as coming within the provisions of the 9 Geo. 2, c. 36 (the Mortmain Act), and that the bequest as regards the trustees of St. George's Hospital, in the county of Middlesex, did not take effect, by reason of the events on which the gift to the trustees was to take effect not having arisen.

On the 5th December, 1855, the Attorney-General intervened in the matter, and filed his information against all the other parties, insisting that the indenture of the 6th December, 1853, was a valid dedication of the land, and that the bequest contained in the will was a valid bequest, and *ought to be carried *342 into effect and the charity established. The case was heard at the Rolls, and on the 10th March, 1856, a decree was made dismissing the information.¹ Both these decrees were appealed against.

The Attorney-General (Sir R. Bethell) and Mr. G. M. Giffard for the appellant Philpott. — This bequest is perfectly valid. It is no objection to a bequest of this kind, as seems to have been supposed in *Dixon v. Butler*,² and *Trye v. The Corporation of Gloucester*,³ that it may have a tendency or offer an inducement "to bring fresh lands into mortmain." It is a mistake to think that that doctrine was adopted in *Dunn v. Bownas*.⁴ It certainly was doubted in *Edwards v. Hall*.⁵ The word "purchase" must here receive its ordinary meaning. The doctrine of tendency cannot be applied to the provisions of a penal statute.

¹ 21 Beav. 134.

⁴ 1 Kay & J. 596.

² 3 Younge & C. Exch. 677.

⁵ 6 De G., M. & G. 74, 88.

³ 14 Beav. 173–196.

[LORD BROUGHAM. — This is not a penal statute any more than any statute which merely denounces a particular mode of proceeding.]

[THE LORD CHANCELLOR. — No forfeiture is attached to the contravention of the statute. What is done against its provisions is merely void.]

The object of the statute is to discourage gifts made to charities on death-bed, but the prohibition to make such gifts is confined to lands. As to the gift of personalty the statute leaves every one at perfect freedom to make it, and a bequest of personalty will be good, although it may have the effect of inducing other persons to bring lands into mortmain; nor need such a bequest distinctly point to lands that are already in mortmain. A bequest of * 343 50,000*l.* to a *hospital is good, although the object of the bequest cannot be attained except through the means of additional buildings being erected for the sick.

To the extent of affirming that money given to be laid out in building, where the land on which it was to be built was already in a condition lawfully to be applied to such a purpose is a valid bequest, the case of *The Attorney-General v. Bowles*¹ is a good authority, although Lord Northington in *The Attorney-General v. Tyndall*² made a direct attack upon it, in which, however, his Lordship committed the mistake of asserting that so giving money was “in fact laying out money in land; it improves the site, is demandable in a *præcipe*, and is a purchase of so much realty.” That doctrine has been overruled in all subsequent cases. In *The Attorney-General v. Davies*,³ a gift of money was made to an orphan school, provided that the orphan school would do something which amounted to a purchase of land for charity, and that gift was of course for that reason held bad.

[LORD BROUGHAM. — As in *Widmore v. Woodroffe*,⁴ the gift of money to Queen Anne’s Bounty was held void because the trustees are bound to buy land.]

The rule that the money given must be expressly directed to be applied to land already in mortmain is too strictly stated. It is admitted that it must not be given with a mere direction to build, for building implies the purchase of land, but it is sufficient if land already in mortmain, or land to be given by other people is pointed

¹ 3 Atk. 806, 2 Vez. Sen. 547.

² Amb. 614, 2 Eden, 207.

³ 9 Ves. 535.

⁴ Amb. 636.

at ; and matter *dehors* the will may be looked at to show what was meant by the will : *Giblett v. Hobson*.¹ There a gift of money to build houses for the benefit of the Butchers' * Charitable * 344 Institution, without more, was held void, though the testator, being a member of the institution, knew that land had been offered for the purpose, for there was nothing to show that he forbade the application of his money to the purchase of land.

If land is acquired otherwise than by purchase through the gift of the testator his bequest is good : *Attorney-General v. Parsons*,² *Attorney-General v. Davies*,³ *Pritchard v. Arbouin*.⁴ In the first of these cases the bequest was held good to the extent of any application of the money to land already in mortmain, though not to the acquisition of other land. In *The Attorney-General v. Davies* it was held bad, because the primary object was the purchase of land ; and in *Pritchard v. Arbouin*, Sir J. Leach, Master of the Rolls, held that a mere direction to build without more would imply the purchase of land, and would make the gift bad. *Mather v. Scott*,⁵ like *The Attorney-General v. Whitchurch*,⁶ has been wrongly supposed to be an authority for the doctrine that a gift of money which operates as an inducement to put land into mortmain is bad ; but in truth there the gift was a disguised purchase of the land ; and on that account could not be supported. In *Henshaw v. Atkinson*,⁷ it might well have been contended that such an inducement was held out ; but, there being in that will an express prohibition against buying land, the bequest was held good. In *Dunn v. Bownas*,⁸ the gift was held bad, solely because it could not be carried into effect without providing permanently a house for the hospital ; and in *Edwards v. Hall*,⁹ a direction to employ the residue of * the testatrix's personal estate in * 345 the endowment of district churches and chapels in populous places was held good, Vice-Chancellor Wood holding that " endowment " was there a personal provision, and his decision was affirmed on appeal, there being enough in the case to show that the purchase of land was not the object of the testatrix. Soon after the Statute of Mortmain was passed it was held, in *Sorresby*

¹ 3 Mylne & K. 517.

² 8 Ves. 186.

³ 9 Ves. 535.

⁴ 3 Russ. 456.

⁵ 2 Keen, 172.

⁶ 8 Ves. 141.

⁷ 3 Madd. 306.

⁸ 1 Kay & J. 596.

⁹ 11 Hare, 1, 6 De G., M. & G. 74.

v. *Hollins*,¹ that where there was a direction to secure 50*l.* a year to a charity by the purchase of lands “or otherwise,” the bequest was not within the statute.

Mr. R. Palmer and *Mr. R. Hawkins* for St. George’s Hospital. — The gift for the almshouses in this will is void, and the money passes to St. George’s Hospital.² This is a remedial statute, and must be so construed. It was passed to prevent a public mischief, and it directs that “no manors, lands, &c. nor any sum of money, to be laid out or disposed of in the purchase of any lands, shall be given, granted, or any ways charged or encumbered,” for the benefit of any charitable uses, except in the way therein specified. The word “purchase” in the statute comes from *pour chasser*, to pursue or gain, and is equivalent to acquisition, and any acquisition of land for a charity otherwise than as there specified is bad. The observations of Lord Truro on this subject, in *Myers v. Perigal*,³ are important, though the case itself is not in point. Those observations are fully warranted by preceding cases. In *The Attorney-General v. Hinxman*,⁴ there was a devise of a house for the use of a school-

master of a school, and there was also a bequest of money, * 346 in trust for the payment * of the master, and in keeping the school-house in repair, and Sir T. Plumer, Master of the Rolls, held that the bequest was void. The same principle was acted on in *Way v. East*.⁵ This case was decided below in accordance with *Trye v. The Corporation of Gloucester*,⁶ and there the Master of the Rolls relied on *Cantwell v. Baker*,⁷ *Vaughan v. Farrer*, and *Attorney-General v. Bowles*.⁸ These decisions of Lord Hardwicke cannot be cited to support the gift here. There is no case showing that it is competent for one man to give a large sum of money that another man may bring land into mortmain. Indeed, in *The Attorney-General v. Day*,⁹ where a testator devised an estate to A., and then bequeathed 3000*l.*, the exact value of the estate, to a charity, though A. was ready to act on the will, the Court would

¹ 9 Mod. 221 (8vo ed.).

² The argument on the second of these points is not given, the judgment having rendered the consideration of it unnecessary.

³ 2 De G., M. & G. 599 – 602.

⁴ 2 Jac. & W. 270.

⁵ 3 Atk. 806, 2 Vez. Sen. 547

⁶ 2 Drewry, 44.

⁷ 1 Vez. Sen. 218.

⁸ 14 Beav. 173.

⁹ Cited in *Vaughan v. Farrer*, 2 Vez. Sen. 182, 185.

not execute it to the disherison of the heir. The observations made by Lord Hardwicke in that case, and in *Durour v. Motteux*,¹ and in *Vaughan v. Farrer*,² explain the object of the statute; and those afterwards made by Lord Northington in *The Attorney-General v. Tyndall*³ on the same subject are perfectly correct, though his application of them to mere improvements on land may be doubted.

[LORD BROUGHAM. — According to your contention, I purchase an estate if I do any thing to induce a man to sell the estate.]

That is so; not in the popular sense of those words, but on the meaning of the word "purchase," as used in the statute. *The Attorney-General v. Davies*⁴ is directly in point here, and so is *The Attorney-General v. Hodgson*,⁵ * while *Mather v. Scott*,⁶ admitted by the other side to be a strong case, must be overruled if this gift to the almshouses is to be supported. In *Henshaw v. Atkinson*,⁷ the testator expressed his expectation that other persons would give the land and buildings, and yet the gift was held void, because it was not clearly directed that his money should not be laid out for that purpose. *Edwards v. Hall*,⁸ which turned upon the meaning of the word "endowment," is irrelevant for the purposes of this argument.

Mr. Lloyd and *Mr. Cairns* appeared on behalf of Mrs. Kitching and Mr. Grantham Scott, to contend that if the bequest to the almshouses was void, the money became part of the residue.

Mr. H. Terrell appeared for the Attorney-General, to maintain that the first bequest was good.

THE LORD CHANCELLOR. — My Lords, this case in some respects resembles that which has just been decided by your Lordships.⁹ It arises upon the disposition in a will with respect to charity. The question here is, I conceive, a question wholly dependent upon the true construction to be put upon the Act of the 9th Geo. 2, c. 36. The question arises upon the will of Lord Beauchamp,

¹ 1 Vez. Sen. 320, more fully reported 1 Sim. & S. 292, n.

² 2 Vez. Sen. 182.

³ 2 Eden, 207, Ambl. 614.

⁴ 9 Ves. 535.

⁵ 15 Sim. 146.

⁶ *Beverley v. The Attorney-General*, ante, 310.

⁷ 2 Keen, 172.

⁸ 3 Madd. 306.

⁹ 6 De G., M. & G. 74.

dated the 18th of June, 1847, which contains this bequest. [His Lordship read it.]

Before the Statute 9 Geo. 2, c. 36, there was nothing, so far as I am aware, that prevented the disposition of lands for charitable purposes (provided they were kept free of feudal difficulties) arising upon the Statute of Mortmain. Then it was thought objectionable to give money for the purpose of buying lands, and restrictions on such bequests of money were introduced.

* 348 * There is no doubt that the bequest of this 60,000*l.* was not a gift by a deed enrolled in the manner pointed out by the statute; and if, therefore, it is within the prohibition of "money given to be laid out in the purchase of land," it is struck at by the statute. If it is not within the prohibition, it is not struck at by the statute. The question, therefore, is merely a question upon the true construction of that statute.

Now, it was argued at the bar, that in truth this was a purchase of lands, for it was a direction in some mode or other to acquire the lands. And we have an ingenious, and, I dare say, correct definition of the word "purchase" given to us. It was said that purchase may mean any thing that a person may be able *pour chasser* to gain or pursue; that these lands were to be gained, and that consequently those were lands directed to be purchased. That was a very ingenious argument; but I think the answer made to it by the Attorney-General is quite conclusive, that whatever meaning may be given to the word "purchase," when used on other occasions and in other contexts, here it is perfectly certain and demonstrable that it means "purchase," in the ordinary sense of the word, just as where you speak of the purchase of a horse or the purchase of a watch. The language of the statute is, that no sum of money shall be given to be laid out in the purchase of lands, that is, if you like, *pour chasser* lands, in consideration of money given for them; that is to say, it prohibits the buying of lands. I apprehend, therefore, that there can be no possible doubt that this is not a purchase within the express words of the statute; it is not money given to be applied in buying land.

Indeed, the Master of the Rolls, in his judgment, did not so consider it, but he held the bequest to be nevertheless void, as coming within the spirit of the statute, having, as he described it, a direct tendency to bring lands into mortmain. Now, in one sense, that is perfectly true; this bequest has a direct tendency

to bring lands into mortmain, — *it is a solicitation; it *349 is something that may even operate as an improper pressure upon some one else to bring lands into mortmain. But I must own I think that is not the way in which any Court of justice has a right to deal with prohibitory statutes. Prohibitory statutes prevent you from doing something which formerly it was lawful for you to do. And whenever you can find that any thing done that is substantially that which is prohibited, I think it is perfectly open to the Court to say that that is void, not because it comes within the spirit of the statute, or tends to effect the object which the statute meant to prohibit, but because by reason of the true construction of the statute it is the thing, or one of the things, actually prohibited.

And I think that distinction is very well illustrated by one of the cases that was cited in the course of the argument; I mean the case of *The Attorney-General v. Davies*. What is prohibited is giving money to be laid out in the purchase of lands. In *The Attorney-General v. Davies*,¹ the testator gave the residue of his estate for the use of the Orphan School in the City Road, upon the condition that the committee of that school would convey certain lands. That was not strictly a purchase, but it clearly differed only in name. It was giving them money as a consideration for their giving lands to a charity. And the Court, I think, very properly, held that that was prohibited by the statute, not because it came within the spirit of the statute, or tended to the evil which the statute was meant to remedy, but because it was expressly prohibited by the statute.

So, in this case, if it had been found (no such question has been raised here, but undoubtedly the fact might have awakened great suspicion), if it had been found that the * testator * 350 had said to certain persons, "I will give you land by my will, but with the understanding that when I give money to endow that which you shall build, you shall give the land for the purpose of the charity," that would in truth have been void, not because it came within the spirit of the statute, but because it would have been a thing directly struck at by the statute. It would have been in form a devise to those gentlemen, but in substance a devise to charity, making them in truth trustees. No such question as that has been raised here. I assume, in the observations which I am

¹ 9 Ves. 535.

about to make, that this transaction is, as it purports to be on the face of it, an independent gift of 60,000*l.* for the maintenance of certain almshouses, if within a year after the death of the testator somebody else should give lands and build such almshouses. Now, that is not struck at by the express words of the statute.

Then the only question is, whether, by a long series of authorities, or any course of decisions, it is shown that transactions similar to this have been considered as avoided by the statute. Because, if that should be so, just as I have said in the preceding case, it does not behove us, after a long course of decisions, to inquire minutely or narrowly into what the origin of such course of decisions has been. But upon looking at all the cases, I not only do not find such a course of decisions, but it appears to me that, when the cases are examined, there is a perfectly uniform course of decisions to the contrary. I do not rest my judgment in this case upon any previous authorities as warranting my decision here, but, in the view I take of it, I decide this case upon the construction of the statute and the absence of any authority which interferes with the literal meaning of this enactment.

* 351 * The first case to which I shall advert, and which was decided soon after the passing of this statute, in the time of Lord Hardwicke, was the case of *The Attorney-General v. Bowles*.¹ That was a bequest to executors of a sum of 500*l.* to lay out a part in building a small school-house, with a little house adjoining for the schoolmaster, the purchase of the ground and expenses of the building not to exceed 200*l.* Lord Hardwicke held that that 200*l.* might be lawfully laid out in building upon lands belonging to, or which might belong to, the parish.

I have not the least hesitation in saying, that all the Judges who have questioned this decision have questioned it upon the soundest ground. I am surprised that a Judge of Lord Hardwicke's extreme accuracy and knowledge of jurisprudence generally, should have fallen into such an error as that. The statute has expressly prohibited the giving of money to be invested in land, and in that case there was a positive direction to invest a sum of money in buying a site of ground and building upon it, the whole expenditure not to exceed 200*l.* No doubt Lord Hardwicke might have truly said: "If the testator had only given 200*l.* to be employed in building, not upon land which he himself gave, but upon land

¹ 2 Vez. Sen. 547, 3 Atk. 906.

to be given by others, that would have been valid"; but what he gave was money to be laid out upon the purchase of land and in building upon it.

That was undoubtedly a wrong decision, and it is declared to be so by Lord Northington just ten years afterwards, in the case of *The Attorney-General v. Tyndall*,¹ where Lord Northington pointed out the error into which Lord Hardwicke had fallen. It is said, and we know from the history of the times that it was so, that Lord Northington * owed a grudge to Lord Hardwicke, * 352 and that he liked to throw out observations against his judgments, and probably there may be something of feeling in the mode in which he expressed himself in that case. But I must say that I quite agree with Lord Northington in his opinion that the judgment which Lord Hardwicke gave in the case of *The Attorney-General v. Bowles* is utterly irreconcilable with the statute and with all subsequent decisions.

But Lord Northington, while triumphantly showing the error in *The Attorney-General v. Bowles*, says: "Building on a site is laying out the money in realty, and therefore contrary to the spirit of the statute. It is demandable in a *præcipe*, and is a purchase of so much realty." That has been entirely overruled in subsequent times. No doubt it is an improvement of the realty, but nobody will now pretend to argue that a bequest is void because it directs money to be laid out in building upon, or otherwise improving, land already in mortmain. This seems, however, to have been the opinion of Lord Northington.

My Lords, those two opposite judgments, the first in 1754, and the other in 1764, for a great many years afterwards, during the times of Lord Camden and Lord Bathurst, and even down to the time of Lord Thurlow, led to a great deal of conflicting decision upon this question, whether bequests for building for charitable purposes were or were not good. Just before Lord Thurlow gave up the Great Seal in the year 1792, there came before him the case of *The Attorney-General v. Nash*,² which I think is a very important case with reference to the true view of this subject. There the bequest was upon trust that the persons to whom it was given should cause to be erected and built in Droitwich a * school-house and certain other buildings; and then the * 353 testatrix directed and empowered her trustees to purchase

¹ 2 Eden, 207, Ambler, 614.

² 3 Brown, C. C. 588.

such spot of ground as they should think proper for the purpose. This was argued before Lord Thurlow more than once. The decision of Lord Thurlow is given in rather a strange way ; it is not given as having been a judgment pronounced at the time the decree was made, but as if some observations had been thrown out by Lord Thurlow in the course and at the conclusion of the argument. I observe, looking at the date of the decree, that it was made just three weeks before he gave up the Great Seal, and I dare say it was one of those cases in which he directed the judgment to be entered up, having previously expressed what his views were. Eventually he decided against the validity of the bequest, and I think most properly. The testatrix at first directed that the trustees should cause to be erected a certain school-house upon land which she expressly declared was not to be purchased by her trustees, but was to be land already in mortmain. This direction was, I apprehend, perfectly good. But then she went on and expressly directed and empowered her trustees to purchase such a spot of ground as they should think proper for the purpose. Even there Lord Thurlow struggled hard to endeavour to support the bequest. He says, " I cannot conceive that it would disappoint her intention if the whole land came *aliunde*," treating it as if she had authorised it to come *aliunde*. " The question is, whether authority given to the executors to lay out the money in land would bring it within the statute. If land were given I think it clear that the executors could not keep back one shilling of the bequest for the maintenance of the charity." Therefore what Lord Thurlow said upon that occasion was this, I think it is clear that if anybody else gave the land for the charity, the bequest

* 354 would be perfectly *good, and the trustees could not, without a breach of duty, keep back a farthing of the money. Eventually, however, without giving any reason for altering his opinion, he allowed the demurrer in that case, which was in truth an expression of his decided opinion that the bequest was bad ; and clearly it was bad, because the land did not come *aliunde* to the executors, it was a direction to the executors to purchase whatever land they thought fit. Still it was clearly an intimation of Lord Thurlow's opinion that if there was money to be invested on land acquired *aliunde*, the bequest would be good.

The next case was that of *The Attorney-General v. Whitchurch*,¹

¹ 3 Ves. 141.

before Lord Alvanley, in the year 1796, and it has been supposed to be a case in which Lord Alvanley had intimated an opinion that a bequest to build upon land that should hereafter be given was bad. I think Lord Alvanley meant nothing of the sort. In that case there was a devise of four houses for almshouses, and 2000*l.* to trustees for the benefit of their inmates. There was not the least doubt about the invalidity of that bequest. It was not a bequest of money to be laid out in land, but a bequest of four houses, and the question was whether the bequest of the houses was bad. It was argued that the bequest of the 2000*l.* might be good, in order to be applied, not to the almshouses devised by the testator, but to some other almshouses. But it was eventually decided that that could not be; that the substratum failing, that which was upon it fell also. There Lord Alvanley says: "*The Attorney-General v. Bowles* has been shaken by subsequent authorities, and it is not one of those decisions of his that I can entirely concur in; I mean that part of it where, admitting that the object * was to erect a building upon land not then given, * 355 he throws out that if land should be afterwards given, the statute would not be evaded by applying the money to erect a building upon it." What Lord Alvanley says there is perfectly true, and gives a perfectly correct view of the law. But with respect to that case of *The Attorney-General v. Bowles*, the question there was, not drawing a distinction between a grant of money to be laid out on land that was to be thereafter given, and money to be laid out upon land that was to be purchased, but the question was whether, if the bequest was to lay out in land that was to be purchased with the money, you could repudiate so much of it as directed the purchase of land, and retain the other which directed the building. Lord Alvanley truly says, Lord Hardwicke's view of the law, so understood, cannot be supported.

That a good bequest may be made of money laid out on land to be afterwards acquired, not by means of that money, but by gift or otherwise, appears to me to be a matter not so much decided as taken for granted by all modern Judges down to very recent times. Indeed Lord Eldon, in the case of *The Attorney-General v. Parsons*,¹ states this (the facts of the case are not very material, but I chiefly refer to that case for what Lord Eldon says upon it): "I agree with the late cases, which go a great way to establish

¹ 8 Ves. 186, 191.

that the Court cannot put such a construction upon the word 'erect' as was put upon that word in former cases, and that *prima facie* the testator must be taken to mean by the word, that land shall be bought." That refers to a course of decisions with which I need not trouble your Lordships, in which this question has been in innumerable cases raised. Supposing a testator simply

*356 *directs his executors to build almshouses, or to build a house, does that necessarily imply that they are to get land for the purpose? May it not mean that they are to build if they can find any person willing to give the land? There has long been a great struggle to hold that that was the meaning of it; Lord Hardwicke saying that *erigere* does not mean merely erecting in the sense of physical erection; he alludes to the words by which corporations are constituted, where *erigere* is used in the sense of "constitute." Therefore he says to erect almshouses may simply mean to endow something which has been built by somebody else. However, Lord Eldon approves of the more modern decisions upon that subject as coming under the common-sense view, that where there is a direction to build or erect almshouses, and those words alone are used, it must mean that ground must be acquired for the purpose, unless there is something to point out that the houses are to be built upon ground not to be purchased, but upon ground already existing in mortmain, or to be given by some other person for the purpose. He adds to what I have before quoted: "I think the good sense is with the later cases, requiring that the testator himself should have manifested his purpose to be sufficiently answered if they could hire, or beg land, according to the expressions in the different cases." Is not that conclusive to show that Lord Eldon considered that a direction to build upon land which the devisee could hire, or beg, would be a good bequest. Then he says: "I have reason to know Lord Thurlow's opinion was, that if a testator directs a school to be built, and does not advert himself by words in his will to a purpose, that the land is to be acquired otherwise than by purchase, you ought to infer

that he meant it to be acquired by purchase; and then it *357 will not do." It is quite clear that *Lord Eldon considered that if it was a direction to build upon land which the donees of the money could beg, or upon land which they could otherwise acquire, or upon land already in mortmain, it would be a perfectly good bequest. He does not say that, but he assumes

it as being unquestionable, and all his reasoning goes upon the assumption that that is the law.

Then comes the case to which I have already adverted. *The Attorney-General v. Davies*¹ is extremely important. That case came before Sir William Grant, and then by appeal before Lord Eldon. There the bequest was of "the sum of 5000*l.*, more or less, as it may be wanted to build twelve almshouses, purchase the ground, six for poor men, six for poor women, economy and convenience observed in the structure." Then there was a general gift of the residue to the Orphan School in the City Road, upon the condition that the directors of that school should procure a piece of ground for almshouses, which in truth was a direction substantially to purchase land. The Master of the Rolls held both those bequests to be bad. As to the first there is no doubt. He says: "It must be admitted that if the will stopped with the bequest of the 5000*l.*, it would be wholly void, for the testator gives it expressly to purchase land; and even if he had said nothing about purchasing, a bequest of money to build almshouses would be void according to the later determinations; as the Court will not imply an intention of which the will affords no trace, that if the land should be given, then, and then only, the building shall take place"; clearly showing that Sir William Grant understood the law, not to be controverted, that a gift of money to be employed in building upon land, if land shall hereafter be given, was a perfectly good gift.

* Lord Eldon affirmed the decree of Sir William Grant, * 358 and said: "Whatever were the decisions formerly when charity in this Court received more than fair consideration, it is now clearly established, and I am glad it has come back to some common sense, that unless the testator distinctly points to some land already in mortmain, the Court will understand him to mean that an interest in land is to be purchased, and the gift is not good." That has been taken as if Lord Eldon meant to say that the only case in which the bequest would be good, would be if the almshouse was to be built upon land already in mortmain. That is not a legitimate deduction from what Lord Eldon says, taken in connection with what he had previously said in *The Attorney-General v. Parsons*.² The question then was only between land already in mortmain and land to be purchased. He says in effect

¹ 9 Ves. 535.

² 8 Ves. 186.

"I cannot infer that this is land already in mortmain, or land which is to be acquired in any other mode. If you simply say that you give money to be laid out in building, that *prima facie* means to be laid out in building upon land which is to be procured with the money." I think, therefore, the irresistible inference from all those cases is, that Lord Eldon and Sir William Grant both thought that a gift of money to be laid out in building upon land, which the person to whom the money was given would beg, as he says, or procure in some other way, would be a perfectly good bequest.

Then there was the case of *Henshaw v. Atkinson*,¹ which was before Sir John Leach. There the testator having bequeathed a sum of money to erect a blue-coat school, at Oldham, and establish a blind asylum in Manchester, adds these words: "But I
 * 359 direct that the said money shall not * be applied in the purchase of lands, or the erection of buildings, it being my expectation that other persons will, at their expense, purchase lands and buildings for those purposes." Now, Sir John Leach in his judgment refers to those words as conclusively showing that the gift was perfectly good, because the testator had said that the money was not to be laid out in the purchase of land, or in the erection of buildings upon land, which it was expected other parties would give. It is supposed, however, and I see Lord Langdale seems to imagine, that that case was only to be supported by reason of what follows. For in the codicil there was a direction that till the almshouses could be gotten, the money should be applied to the maintenance of men who were already in almshouses. I think that has been misunderstood, for Sir John Leach, after showing that the bequest was good, because it was to be applied, not in building upon land to be purchased out of the money given by the will, but in building upon land which some other person should give, says (dropping that part of the argument altogether): "It is next argued that it was this testator's intention that the charities were not to take effect until lands or buildings were supplied by others, and that the money may be locked up for an indefinite period of time, and therefore that the bequest cannot be sustained. The cases of *Downing College*² and *The Attorney-General v. The Bishop of Chester*,³ seem to be authori-

¹ 3 Madd. 306.

² 1 Brown, C. C. 444.

³ Ambl. 550.

ties against that objection.” There being no time limited in that case, it was said the bequest may not take effect for a century, because no almshouses may be procured for an indefinite length of time. But Sir John Leach says that the decision in the case of *The Attorney-General v. The Bishop of Chester* was a perfectly * good answer to that. That was a case in which the tes- * 360 tator gave money to found a bishopric in Newfoundland, in case a bishop should be appointed. And it was argued that that was bad upon the very ground that Sir John Leach alludes to, that there was no reason to suppose that a bishop would ever be appointed. However, that was very much canvassed before Lord Thurlow, and it was held to be good. The grounds of that decision it is not necessary for me to go into. Sir John Leach alludes to it, and he says: “But the point does not arise here. In his second codicil the testator directs that his bequest shall take effect immediately.” Therefore I think that Sir John Leach meant to abide by the opinion he had expressed upon those words, namely, that the bequest of money to build almshouses was not void, because it was a direction to build upon land which other people might give for the purposes of the charity.

Then, my Lords, in the present case, his Honour referred to the different authorities, and made his comments upon them, and then he relied upon the three subsequent cases of *Pritchard v. Arbouin*,¹ *Giblett v. Hobson*,² and *Mather v. Scott*.³ Now, the case of *Pritchard v. Arbouin* was a bequest to build a new church. It is referred to both by the Master of the Rolls and by Lord Langdale as a decision of Lord Lyndhurst. It was in fact a decision of Sir John Leach after he became Master of the Rolls. However, that is immaterial. In that case he lays it down, that “it is the standard rule of construction that a direction to build is to be considered as including a direction to purchase land for the purpose of building, unless the testator distinctly points to some land already in mortmain.” For the purpose of that case that was quite accurate. * It was not necessary there to go on to say, * 361 “or to some land to come to his trustees not through the instrumentality of any purchase directed by him.” It is quite clear that the learned Judge only meant to say, “It will not do if

¹ 3 Russ. 456.² 2 Keen, 172.³ 5 Sim. 651, 3 Mylne & K. 517.

there is merely a direction to build," as there was in that case, and therefore it was void.

Exactly the same remark applies to the case of *Giblett v. Hobson*,¹ which came before my noble and learned friend when he held the Great Seal. There the bequest was, "I give and bequeath to the Butchers' Charitable Institution 5000*l.* towards building almshouses to the said institution." Exactly the same principle applies there. That was a direction to build, implying, according to the later authorities, a direction to get land for the purpose of building. My noble and learned friend held, and with perfect propriety, that that was a bad bequest.

Then comes the remaining case of *Mather v. Scott*,² before Lord Langdale. There the gift was of residue to trustees, with a request that they will entreat the lord of the manor to give a spot of ground suitable for the erection of so many decent buildings or rooms, something like the charity called the Twelves. Lord Langdale, the Master of the Rolls, said, "I think the language does not exclude the trustees from purchasing land if they think proper, and, if so, the bequest will be void." I think that that was a perfectly right decision; certainly it was a right construction of the will. The right construction of the will was that they were to get a site at all events, if they could from the lord of the manor, but if not, by buying it, and therefore, according to all the authorities, that bequest was bad.

* 362 * I have thought it necessary to allude to the different authorities, not for the purpose of founding myself upon any of those authorities in the present case. I rest upon the true construction of the statute, which I think does not forbid what has been done here. I refer to those authorities only for the purpose of showing that they do not lead to any contrary conclusion. If there had been no authorities at all, I should still have come to the same conclusion; but the authorities, so far as they go, appear to me rather to warrant than to go against what I consider to be the true construction of the statute. Therefore, in this case, I am of opinion that there has been a miscarriage in the Court below, and that the decree must be reversed.

LORD BROUGHAM. — My Lords, I think, with my noble and learned friend, that in this case there has been a miscarriage,

¹ 3 Mylne & K. 517.

² 2 Keen, 172.

looking to the principle upon which the decision of the Court below seems to have proceeded. The learned Master of the Rolls appears to have gone upon the assumption that, under the words of the Act, "money, or any other personal estate whatsoever, to be laid out or disposed of in the purchase of land," we have a right to include a bequest of money, which may lead to the purchase of land, or be employed in any manner, or which may ultimately tend in its effect, to produce a purchase of land. My answer to that is, that the Legislature has not said so; it confines the prohibition to the laying out of money in the purchase of lands; and I think that the expression, "purchase of lands," in this case, must be taken in its ordinary sense, as it occurs in the first and second sections, and more especially in the third section, where the words are, "money, goods, chattels, or other personal estate, or securities for * money, to be laid out or * 363 disposed of in the purchase of any lands." My Lords, we cannot feel any doubt, when the question arises, as to the meaning of the words used; we may look at the spirit as well as at the letter of the enactment. But here, in order to uphold the decision, we are called upon to go a great deal further, and to look at the presumed intention of the Legislature. Because the Legislature has confined itself to one specific mode of accomplishing its purpose of carrying into effect the intention with which it made the enactment, we are therefore to add enactments which the Legislature never made, provisions beyond what the Legislature has made, for the purpose of completing that which it left incomplete, for the purpose of supplying what it left defective. I am not at all prepared to adopt any such general principle of construction.

If the cases went to that extent, I agree with my noble and learned friend that no doubt they would throw great light upon the subject, and would make one hesitate in confining the rule of construction so closely as I think it ought to be confined. But I do not discover any thing in any of the cases which leads to that conclusion. Much has been said of the case which was before me, of *Giblett v. Hobson*,¹ and I think that the Master of the Rolls goes, among other grounds, upon that case. I think there is nothing in it to warrant the conclusion at which he has arrived. I have looked into it very carefully, and I find no reason whatever to depart from the opinion which I then held. I said that I would draw

¹ 3 Mylne & K. 517.

two positions from the statute itself, and from the cases which have been decided upon the construction and application of that statute.

One of those positions was, that money given for erecting
 * 364 or building houses, if nothing further is found * in the gift, must be taken to mean money to be laid out in lands, inas-much as houses cannot be built except upon land ; always excepting, no doubt, what from the nature of the case clearly must not be considered as within the prohibition of the Act, viz. land already in mortmain, for, no doubt, money directed to be laid out in the building of houses upon land already in mortmain is no contravention of the statute, although certainly there is something in Lord Northington's language which shows that, very likely, he would have been prepared to hold that money directed to be laid out in improving land already in mortmain, should be taken as money to be invested in land not in mortmain, and consequently to be considered void. It would be impossible to contend that, even if there were no cases to the contrary. It appears to me, with great deference to the authority of that learned Judge, to be inconsistent, not to say absurd.

Then the other position which I drew from the Act and from the decided cases was, that if it appeared from other circumstances in the will, or even if it appeared from matter *dehors* the instrument, that the intention of the giver was that the money should be laid out simply in building upon land, not perhaps already in mortmain, but that the intention of the testator was to give money for the purpose of building houses upon land, if not already in mortmain, at least on land to be obtained in any other way than by purchase with the money given by himself, then in that case it was not a gift of money, either directly or indirectly, for the purchase of land, but it was a gift of money to build houses upon land either already in mortmain, or which was to be obtained, not by purchase with that money, but to be obtained *aliunde*, and consequently that that gift of money was not, within the statute, forbidden as a gift for the purchase of land, and therefore void.

* 365 * I have no reason whatever to doubt that both those propositions are according to the law upon the subject. But neither of them at all supports the judgment of the Master of the Rolls in this case, any more than the other decision to which my noble and learned friend has adverted, of *The Attorney-General v.*

Parsons.¹ It not only does not support the decision of the Master of the Rolls, but it appears to me to go directly against it.

There is a doubt raised upon the case of *The Attorney-General v. Davies*,² as if Lord Eldon had confined the exception there to the single case of building upon land already in mortmain. Now, it is perfectly clear, from the reason of the thing indeed, but still more from the case of *The Attorney-General v. Parsons*, that he could not have had any such intention whatever. *The Attorney-General v. Parsons* having been decided before *The Attorney-General v. Davies*, Lord Eldon must have been confining himself there to land already in mortmain, because that was the matter in dispute. My noble and learned friend on the Woolsack has pointed out the reason why he confined himself to that specific point. The fact is, that *The Attorney-General v. Parsons*, which speaks of "hiring or begging" land, is the strongest possible confirmation of the view which we have put, and of the construction we are now putting upon the word "purchase" in the Statute of the 9th of Geo. 2.

On the whole, therefore, I am of opinion that there has been in this case a miscarriage, and that according to the true construction of the words of the Mortmain Act, and according to the true construction to be put upon the decisions under that Act, the case is not such as to come within the enactment.

* LORD WENSLEYDALE. — My Lords, in this case I am of * 366 the same opinion as both my noble and learned friends who have preceded me. I think that this is a very clear case. It arises entirely upon the construction of the statute. We have to see whether that statute forbids this particular disposition of money, viz. money to be laid out in erecting almshouses in the particular place in which these almshouses are to be erected. We have nothing to do in the present case, whatever our suspicions may be, with any supposed trust on the part of Colonel Scott to devote some of the lands bequeathed to him by Lord Beauchamp for the purpose of the charity. No such case has been made; and though we may have a great suspicion on the subject, it would not warrant us in coming to the conclusion that this gift is void on that ground. If there was a secret trust, I apprehend that that would be within the statute, and consequently void. Therefore that matter we

¹ 8 Ves. 186 - 191.

² 9 Ves. 535.

must dismiss entirely from our consideration. The real question in the case is whether this, in the true construction of the Statute of Mortmain, is a transaction which is defeated by the provisions of that Act, and I am clearly of opinion that it is not. We ought to look to the words of the statute and to give those words their natural and ordinary meaning. But in this case, as has I think sometimes happened in other cases, instead of the words of the original statute being referred to, the learned Judges have proceeded upon the conclusions of law arrived at in the prior decisions and not upon the words of the Act itself.

If we look at the words of the Act, there is not the least question about their meaning. The statute says, [his Lordship read the recital and enactment.] This did not mean, as the Master of the Rolls seems to have supposed, "to be laid out or disposed of * 367 on land," but * to be laid out or disposed of in the purchase of land. The same observations may be made with respect to Lord Northington's decision in the case which has been cited, where he spoke of the impossibility of allowing money to be laid out in improving land, he considering the words of the statute to be, "to be laid out or disposed of on land." The thing prohibited is money "to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments." Such money shall not be given, granted, aliened, limited, released, transferred, assigned, or appointed, or any ways conveyed, or settled to, or upon any person or persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or encumbered by any person or persons whatsoever, in trust or for the benefit of any charitable uses whatsoever.

Now, it is quite clear that the statute prohibits all dispositions of land, and all dispositions of money to be employed in the purchase of land to be devoted to charitable uses. The word "purchase," which occurs in four sections of the statute, is clearly, I think, to be understood in its ordinary sense, in the way in which it would be understood at the time; that is, as meaning buying land, giving an equivalent for the land in money, or in personal property, and acquiring the land in that way; as my noble and learned friend has said, it does not mean the acquisition or pursuit according to the supposed derivation taken from the old French law. It is impossible to put that construction upon it. It is equally impossible, I think, to put upon it the construction of pur-

chase, as contrasted with descent. It must mean, according to the language here used, a purchase in the ordinary sense of the word, for a consideration. So we must hold it, unless some cases have put a contrary construction upon it, and I should * expect, in order to prevent our making use of the natural * 368 and ordinary meaning of that word, that there should be produced some uniform course of decisions which had established a different meaning.

Now, looking at the collection of cases which has been referred to by the Master of the Rolls in the case of *Trye v. The Corporation of Gloucester*¹ (and I believe he has there collected them all together), I cannot find any trace of any doctrine which has put a different construction upon the word "purchase." It is very true that there are two or three dicta. In *The Attorney-General v. Whitchurch*,² there is a dictum of Alvanley, in which he says, that if these transactions were allowed, it would be something like equivalent to the purchase of land. Then again there is a dictum of Lord Northington, which has been already referred to, where he considers the matters as if the statute had not used the word "purchase," and therefore he argues that every employment of money to be laid out, even upon land already in mortmain, every thing that gives additional value to the land, is prohibited by the statute, because it is increasing the value of the land, which he says could be recovered in a real action; he considers that every expenditure of money upon land, whether purchased or not, would be a violation of the statute. Then, again, there is a dictum by Lord Langdale, when Master of the Rolls, in the case of *Mather v. Scott*,³ in which he gives an opinion upon the construction of a will; and he seems to intimate that any thing which tends to the laying out of money upon land comes within the statute.

But if you look at the decided cases really and truly, there is not a single one which says that the word "purchase" is to be construed in any other than its * ordinary sense. There * 369 are some cases which have been decided, and which have not been impugned, where transactions exactly similar to the present were upheld. There is the case of *Henshaw v. Atkinson*,⁴ before Sir John Leach; there is the case of *Dixon v. Butler*,⁵ which

¹ 14 Beav. 173.⁴ 3 Madd. 306.² 3 Ves. 141.⁵ 3 Younge & C. Exch. 677.³ 2 Keen, 172.

was decided by the late Baron Alderson, a very great authority upon all matters of law. He considered that in that case it was perfectly right, and not at all prohibited by the statute, to give a sum of money to build a church upon ground already consecrated, and where the land was already provided. Those are two cases expressly in point, putting the true construction upon the word "purchase," that no money is to be laid out in acquiring land, but that if the land is given *aliunde*, those transactions are not at all touched by the statute.

Then let us refer to some of the other authorities, from which the Master of the Rolls seems to deduce a new rule upon the subject, and upon which he says that the statute strikes at this very mode of dealing with land which would induce persons to give it in mortmain. That is the principle which he deduces from those authorities. He also deduces another principle; that if a person directs a sum of money to be laid out in buildings, it must be considered as a direction to purchase land, except in the solitary case, as he expresses it, of money so to be expended upon some land already in mortmain. Those are the two principles which the Master of the Rolls deduces from all the authorities which are cited. He says that the true construction of the Statute 9 Geo. 2, c. 36, is, that that is void which tends directly to bring fresh lands into mortmain. I think it will be found that that principle, or any principle of that nature, cannot really be

* 370 deduced from the cases which he * quotes. He also says that a bequest of money, to be expended in the erection or repair of buildings, is void, unless the testator expressly states in his will his intention that the money so bequeathed is to be expended on some land then already in mortmain. The only exception, in his opinion, is, if the testator directs the money to be expended upon land already in mortmain. I apprehend that no such principle, either one or the other, can be deduced from the cases.

It is perfectly well established, that if a person directs money to be laid out in erecting a building, that is to be considered as, by implication, also directing the land to be procured upon which to erect the building. There is no doubt, looking at the cases, that that is, unquestionably, the law; that if he directs simply, without any qualifying circumstances, and without any explanation whatever, that the money is to be laid out in building houses, it does import

prima facie, until it is explained, that it is to be expended partly upon the purchase of land. But then there are many exceptions to that. If at the same time he declares that no part is to be expended in the purchase of land, no one will hold that that is to be considered as a direction to purchase land. That is one of the classes of exception. Or if he refers (that is another) to any particular land which is already in mortmain, then that also is an exception to the rule, provided that he points out that land particularly; for then the circumstances demonstrate that the money is not to be laid out in land.

Now, all these cases were commented upon by Lord Eldon in that of *The Attorney-General v. Parsons*.¹ That which his Lordship there said was confined to the case of money being to be laid out in land afterwards to *be acquired or procured by any *371 means, except purchase, from any other person, in order to erect a building upon it. That in the opinion of Lord Eldon is valid; he afterwards held, in the case of *The Attorney-General v. Davies*,² that the bequest there was clearly a purchase of land, because there was a direction that the money was to be given to any person who would devote land to charitable purposes. That is neither more nor less than a purchase of land, which is clearly struck at by the statute. Then Lord Eldon says, that unless the testator distinctly points to some land already in mortmain, he must understand that the testator means that some land should be purchased; and that in that case the gift is not good.

I think there is a further expression of Lord Eldon's to the same effect in another case. That point must therefore be regarded as settled; that a direction to build must be considered as implying also a direction to obtain land whereon to build. That is the whole of what Lord Eldon said upon the subject. But he clearly contemplates that building may be not merely upon land which is already in mortmain, but upon land which may be procured *aliunde* without purchase, and the gift will be valid.

Now the Master of the Rolls, in giving his judgment, also relied upon the expressions of Sir John Leach, when Master of the Rolls, in the case of *Pritchard v. Arbouin*,³ where it was said, "that it was the settled rule of construction, that a direction to build is to be considered as including a direction to purchase land for the

¹ 8 Ves. 186.

² 3 Russ. 456.

³ 9 Ves. 535.

purpose of building, unless the testator distinctly pointed to some land which was already in mortmain," and he declared the bequest void. It is obvious there that that is only one of the cir-

* 372 cumstances * which prevent the direction to build being construed to be a direction to purchase. There are others.

The Master of the Rolls also relied upon some observations made in the case of *Giblett v. Hobson*,¹ by Lord Brougham, who goes through all the cases there and comments upon each. His Lordship had a very clear opinion upon what the effect would be if the direction were to build upon land not already in mortmain, but acquired *aliunde* by some mode other than by purchase. In that very distinct, able, and elaborate judgment, his Lordship says: "No one can doubt that the doctrine which Lord Northington laid down in *The Attorney-General v. Tyndall*, though not the decision itself, is contrary to law. When he states it to be as clear as any proposition in Euclid, that the Mortmain Act prohibits not merely bequests for the purchasing of lands, but also all realizing for the benefit of a charity, and expressly adds, to leave no doubt as to what he meant by realizing, that but for such a prohibition, 20,000*l.* might be laid out in building upon land not worth 50*l.*, it is quite clear that his Lordship stated what was not law, for no one can think of maintaining that a bequest of money to be laid out in building on land already in mortmain, or which might be acquired in aid of a testator's charitable purpose, through independent and valid titles, is struck at by the statute." Therefore that is a clear opinion on the part of his Lordship, that in a case where the land was procured other than by giving money from the testator in exchange for land, it would not be a gift in mortmain; the money might be laid out properly, and without being forbidden by the Statute of Mortmain, in erecting buildings upon that land. His Lordship goes on to allude to the case of *The*
 *373 * *Attorney-General v. Davies*. He says: "Again, if we take the words of Lord Eldon literally, in *The Attorney-General v. Davies*, they seem to confine the exception to cases where the land to be built upon is already (that is at the date of the will, or at least at the testator's death) in mortmain. But the reason of the matter extends this also to cases where the testator may plainly appear to have in contemplation a future acquisition of building land otherwise than by means of the legacy"; that

¹ 3 Mylne & K. 517, 526 - 530.

is, otherwise than by using the legacy in purchasing that land ; “and Lord Eldon clearly assumes that in what he says in the other case I have referred to, *The Attorney-General v. Parsons*, where he speaks of hiring or begging land.”

Therefore, considering all the cases which have been decided upon this subject, without going further into them at present, I think it perfectly clear that the natural and ordinary meaning of the word in the statute is a purchase of land, or money given in exchange for land. There is no course of decisions, but far from it, which shows that it is to be understood in any other than the ordinary sense. On the contrary, the decisions to which I have referred show clearly that if land is given by another person, and not through the instrumentality of the money of the testator, or as the price of the money left by the testator, that is untouched by the Statute of Mortmain. Therefore I consider it perfectly clear that there is nothing in this case to prevent our putting the proper construction upon these words. The words have a clear and distinct meaning, and no doubt they are used in the statute in the sense in which they would be used anywhere else. And with respect to the principle which the Master of the Rolls deduces from the cases, I think he is hardly warranted in coming to the conclusion at which he arrives. I do not think any such principle has been laid down. It is perfectly *clear *374 that if a man directs money to be laid out in building, he impliedly authorises the money to be laid out in the purchase of land ; and if he says no more that bequest will fail. But I think that that inference may be repelled if he directs that the money is not to be laid out in the purchase of land, but is to be laid out upon land already in mortmain, so that no other land is put in mortmain, and also if he directs that the land shall be procured from any other person who will give it, without any reward to himself, and dedicate it to the purpose of the charity.

I am of opinion, therefore, that we ought to refer to the words of the statute itself, and that, acting upon them, the circumstances of this case do not bring it within the mischief provided for by the statute. I think that the Master of the Rolls has come to a wrong conclusion, and that the judgment must, therefore, be reversed.

The Attorney-General suggested that the decrees complained of should be reversed, save as to costs, and that the gift of 60,000*l.*

to the trustees for the purpose of founding almshouses (taking the words of the will) should be declared a good, charitable gift, and to be carried into effect, and with that declaration to remit the causes to the Court below ; and with respect to the costs of this appeal, that this was not a case falling within the general rule, as to the residuary legatee paying costs for the construction of a will, for that there was here nothing to construe, but there was an error made by the Court below with regard to the validity of the bequest. He therefore suggested that the costs of all the parties to the appeal should come out of the fund which was the subject in dispute.

LORD WENSLEYDALE. — The only obscurity that is created by the testator is as to the terms upon which the money is to go over to St. George's Hospital.

* 375 * The suggestion of the Attorney-General was adopted.

Decrees reversed, and causes remitted, with a declaration, and a direction as to costs.

Lords' Journals, 24th July, 1857.

SMITH v. OSBORNE.

1857. June 11, 12 ; August 15.

ARTHUR SMITH, *Appellant*.

LUCINDA CAULFIELD OSBORNE and others, *Respondents*.

Covenant in Settlement. Expectant Estate in Remainder. "Surviving." "Such Issue."

Where there is, in a will, a gift to two designated devisees, as tenants in common in tail, and if either should die without issue, then to the "surviving" devisee, that word must be taken to mean "other."

Where a man in his marriage settlement describes himself as entitled to an expectant estate in remainder in two pieces of land, and covenants that when "such remainder" shall become vested in possession, he will convey it to the uses of the settlement, if he becomes possessed of either of these pieces of land by a title different from that described in the settlement, the covenant will not attach upon it: *Noel v. Bewley* (3 Sim. 108), doubted.¹

¹ *Atkinson v. Holtby*, 10 H. L. Cas. 321 ; *Collingwood v. Stanhope*, Law Rep. 4 H. L. 48.

O., in anticipation of marriage, executed a settlement, which recited, that "whereas O. is entitled to a contingent remainder on failure of the issue of G. C., party hereto, in the town and lands of S., and in certain tenements in W., subject only to such powers over the same as shall appear to be vested in G. C., under and by virtue of the last will of T. C.," and it went on to covenant, that when and so soon as "the said remainder" should become vested in O. in possession, he would then convey the property to the uses of the settlement. By the will of T. C., both these properties were devised to G. C. for life, remainder to his first and other sons in tail, remainder to the testator's daughters, Elizabeth and Frances, as tenants in common in tail, and if either daughter should die without issue, then "to the use of my surviving daughter and the heirs of her body lawfully issuing, and in default of such issue, to my own right heirs." G. C. died unmarried, and the lands of S. and W. descended to the two daughters (one of whom was O.'s mother) as tenants in common. The two sisters executed disentailing deeds as to S., but not as to W., and soon afterwards O.'s mother died intestate, and her property descended to O., her son, the covenantor. The other sister by will gave all her property to O., her nephew, subject to certain annuities and legacies : —

- * Held, that as to the lands at S., the entail of which had been barred, * 376 and which had not descended to O. under the will of T. C., this covenant did not take effect; but it did take effect as to the lands at W., for the word "surviving" in the will of T. C. must be construed to mean "other," and the words "such issue" include the issue of both daughters, and therefore O. succeeded to both moieties of that estate as tenant in tail under the will.

THIS was an appeal against a decree of the Lord Chancellor of Ireland in a suit instituted by a "Cause petition," under the provisions of 13 & 14 Vict. c. 89, "the Court of Chancery (Ireland) Registration Act, 1850."

In July, 1813, Richard Boyse Osborne, since deceased, married the first-named respondent, then Lucinda Caulfield Humphrey. The other respondents were the children of the marriage. The appellant was at that time the solicitor of Mr. Osborne.

A settlement was executed, dated 8th July, 1813, by which Mr. Osborne conveyed to Arundel C. Best and George Carr, as trustees, certain estates in the counties of Tipperary and Kilkenny,¹ to the use of himself for life, with remainder to uses to secure to the respondent, his intended wife, an annuity of 500*l.* for her life, with remainder to the issue of the marriage as therein mentioned.

The settlement then contained a recital and covenant in the words following : —

"Whereas the said Richard Boyse Osborne under and by virtue

¹ These estates had since been sold in the Incumbent Estates Court, having been exhausted by the encumbrances upon them.

of the last will and testament of his grandfather, Thomas Carr, formerly of the city of Waterford, Esq., deceased, and bearing date the 22d of January, 1773, is entitled to a contingent remainder, on failure of issue in the said George Carr, party hereto, in the town and lands of Stonehouse, in the county of Waterford, and in * 377 certain * ground, tenements, and concerns in New Street, in the city of Waterford, subject only to such power or powers over the same as shall appear to be vested in the said George Carr under and by virtue of the last will and testament of the said Thomas. Now this indenture further witnesseth that the said Richard Boyse Osborne doth hereby for himself, his heirs, and assigns, covenant, promise, and agree to and with the said Arundel Caulfield Best and George Carr, their heirs and assigns, that he, the said Richard Boyse Osborne, when and as soon as the said remainder in the said lands of Stonehouse, in the county of Waterford, and the said grounds and premises in New Street, in the city of Waterford, or any part or parts thereof, shall become vested in possession in him, shall and will grant, assure, and convey the same, and every part thereof, and all his estate or title to or in trust therein unto the said Arundel Caulfield Best and George Carr, their heirs and assigns, to the like uses, upon the like trusts, and to and for the like intents and purposes as the said several lands and premises hereinbefore granted and conveyed."

The settlement was prepared in the office of Mr. Humphrey, the father of Mr. Osborne's intended wife, and he had the will of Mr. T. Carr at the time in his possession. The settlement was duly registered.

The will of Thomas Carr thus referred to was dated 22d January, 1773, and by it the testator devised the lands and tenements in question (which were held on leases for lives renewable for ever) to certain trustees therein mentioned: as to the lands of Stonehouse, to the use of his son George Carr, for his life, remainder to trustees to support contingent remainders; remainder to the first and other sons of George Carr in tail; remainder to the daughters of George Carr, as tenants in common in tail; remainder to the use of the testator's daughters, Elizabeth and

Frances, as tenants in common in tail; and if either * 378 daughter * should die without issue, then to the use of the surviving daughter in tail; remainder to the use of his right heirs. As to the premises in New Street, to the use of the

testator's wife for her life, with all the remainders of the preceding estate exactly repeated.

The lands and premises in question were held for leases for lives, renewable for ever.

George Carr was never married, and he died before the year 1824.

Elizabeth and Frances, his two sisters, survived him and became tenants in common in *quasi* tail of the Stonehouse and of the New Street property. Elizabeth was married, and Richard Boyse Osborne was her eldest son. Frances Carr was unmarried.

On the 18th of May, 1824, Elizabeth Osborne having survived her husband, and also her brother George Carr, conveyed her moiety of the lands of Stonehouse to William Hobbs, to the use of herself, her heirs, and assigns, thereby barring her estate tail in the said lands, and becoming seised thereof for an estate of inheritance descendible to her heirs general; and on the 16th of October, 1824, Frances Carr executed a like conveyance. Elizabeth Osborne and Frances Carr afterwards by an indenture, dated the 24th of October, 1828, obtained a renewal of the lease of the lands of Stonehouse, which was granted to them, their heirs, and assigns.

Elizabeth Osborne died intestate in the year 1830, leaving R. B. Osborne her only son and heir at law. Frances Carr died in January, 1840, having previously made her will, dated on the 10th of that month. By this will she gave her interest in the lands of Stonehouse to trustees, in trust to permit R. B. Osborne to receive an annuity of 100*l.* for his life, and after his death to the use of his son or sons, as he might by will appoint: and upon trust as to the remainder of the property of Stonehouse, that her nephew, George Whitmore Carr, should receive *yearly *379 50*l.* for his life; and she appointed Richard Boyse Osborne residuary legatee. He was also her heir at law.

The premises in Waterford, called the New Street property, were by a renewed lease, dated in 1791, vested in George Carr, with a covenant for perpetual renewal. Elizabeth Osborne and Frances Carr never executed any deed barring their estate tail in this property. In 1834, Richard Boyse Osborne, being then entitled in possession, as eldest son of Elizabeth Osborne, to one moiety of the premises, sold and conveyed the same, in consideration of 350*l.*, to Frances Carr. In 1842, after the death of Frances Carr, Richard Boyse Osborne obtained a renewal of the lease of the premises,

and they were finally conveyed by him to the appellant for valuable consideration, along with the Stonehouse property. He afterwards conveyed both properties to the appellant.

No conveyance of the Stonehouse and Waterford properties had been executed in accordance with the settlement, and the parties claiming under it instituted a suit in the Court of Chancery, in Ireland, by presenting what is there called a cause petition against the appellant, praying for a conveyance and the appointment of a receiver of the Stonehouse and Waterford property, and by the decree of the Lord Chancellor of Ireland, dated the 17th of June, 1854, it was declared that they were entitled to have the covenant in the settlement carried into specific execution as against the undivided moiety of the lands of Stonehouse and the houses in Waterford in the petition mentioned, which descended to the said Richard Boyse Osborne on the death of his mother Elizabeth Osborne; and also as against the other undivided moiety, subject to the trusts and charges in the will of Frances Ann Carr contained.

This was an appeal against that decree.

* 380 * *The Attorney-General (Sir R. Bethell) and Mr. Cairns* for the appellant. — The covenant here is not binding on the settlor, for the estate he takes is entirely different from that which was the subject of that covenant. The cases of *Williamson v. Butterfield*,¹ *Tayleur v. Dickenson*,² and *Otter v. Melvill*,³ must be overruled, or the judgment now appealed against must be reversed. In the first, A. being possessed of a lease for years, covenanted, in an indenture for making a family provision, that if he should die during the continuance of the lease, his executors should assign the residue of the term to B. A. purchased the reversion in fee and died, and the Court of Common Pleas, then presided over by Lord Eldon, held that the covenant did not preclude A. from purchasing the reversion, and that his executors were not liable on the covenant. In *Tayleur v. Dickenson*, A. being under her parents' settlement tenant in tail in remainder of certain lands, expectant on the failure of male issue of her brother, agreed in her own marriage settlement (which recited the former) that, "in case she shall succeed to any such estate as aforesaid," it shall be conveyed to the uses of her settlement. The brother suffered a recovery,

¹ 2 Bos. & P. 63.

² 2 De G. & S. 257.

³ 1 Russ. 521.

and died intestate, whereon she took one-fourth part of his estate as one of his four coheiresses. The covenant was held not to affect the fee simple so coming to her by descent. The principle on which both those cases proceeded was, that the covenant was to convey a certain estate, that the covenantor became possessed of an entirely different estate, and that consequently the covenant did not apply. That is precisely the point here. In the case in the Common Pleas * the decision was all the stronger, * 381 because the change was effected by the act of the covenantor himself. In *Otter v. Melvill*, a covenant to convey all the personal estate to which the wife "shall become entitled," was held not to extend to property to which, without the knowledge of the husband or the trustees, the wife had then an absolute title. That principle runs through all the cases except *Noel v. Bewley*,¹ and that case cannot be supported. A different rule would indeed put the Courts into the position of making and altering, not of executing contracts.

There are two classes of cases which will be relied on by the other side. In the first are to be found instances of the rule, that where a man sells an estate which he has not got at the time, when he does get it, he is bound to convey it. In the other is exemplified in the rule, that where a man, on occasion of selling and conveying property to another, enters into a covenant for further assurance, when called on further to assure what he has sold, he is bound by his covenant to give the vendee the benefit of an intermediate improvement in his title. But neither of these rules affects the present case. The covenant for further assurance in this case relates only to the property which actually was conveyed by the settlement, not to that which was in expectation.

The principle being thus clear, what is there to affect its application here? There is the case of *Noel v. Bewley*,² which will be relied on by the respondents. There A., a remainder-man, conveyed his interest to secure a debt; the remainder was afterwards destroyed by the tenant of the prior estate, and A. subsequently acquired a new interest in the property under the will of that tenant.

* Vice-Chancellor Shadwell held that that new interest was * 382 available to the creditors under the original conveyance. His Honour said: ³ "Now, it strikes me that any interest which Sir

¹ 3 Sim. 103.

² 3 Sim. 115.

³ 3 Sim. 103.

C. Blunt might acquire in the estate which he professed to convey by the deed of 1802 would be operated upon by the covenant for further assurance ; and that, therefore, inasmuch as the contingent remainder was destroyed, and in lieu of it he received a different interest in the land, he is bound in equity to make good his covenant. But I do not place much reliance on the covenant for further assurance, because I take the law to be this : that if a person has conveyed a defective title, and he afterwards acquires a good title, this Court will make that good title available to make the contract effectual." That decision is either inapplicable to such circumstances as exist here, or it is erroneous. The cases relied on to support *Noel v. Bewley* have not that effect. They are, first, *Taylor v. Debar*,¹ which runs thus : " A purchaser of the Crown lands in the time of the late wars sells part to the plaintiff, and covenants to make further assurance. He, on the King's restitution, for 300*l.* had a lease for years made to him under the King's title. The decree was he should assign his term in the part he sold." The reason of the judgment is not explained, but it is probably that which was given in the case of *Smith v. Baker*,² namely, that he had professed to sell the fee simple, and was bound to make good to the best of his power his contract with the purchaser.

The next case is that of *Jones v. Kearney*.³ There a party in possession of premises as the assignee of a lease, subject to * 383 an annuity, pending an eviction for non-payment of * rent entered into an agreement for a new lease, at a less rent, to commence from the termination of the time allowed for redemption, and though the eviction in relation to the old interest was actually bad, the new interest was treated as a graft upon the old, and as such was held to be subject to the annuity. There the interest in the lease and the annuity were connected together ; the lessee was in a fiduciary position, and was bound to hold the new lease for the purposes of the contract as he had held the old one. There the case of *Noel v. Bewley* had, among others, been referred to, and the Lord Chancellor (Sir E. Sugden)⁴ said : " These cases seem to

¹ 1 Ch. Cas. 274, repeated in vol. 2, p. 212.

² 1 Younge & C. Ch. 223.

³ 1 Drury & War. 134, 1 Con. & L. 34.

⁴ 1 Drury & War. 159, 1 Con. & L. 50. In the latter report the words are, " and if the title which he had at the time he made the mortgage is defective,

me to establish this, that if a man sells an estate (and the principle is just the same if he grants his lands on mortgage, or creates an annuity issuing out of them) and the title is afterwards defeated, but subsequently he acquires the same lands under another title, there is an equity arising out of the contract to fasten it upon the new title." It is, of course, clear that if a man professes to mortgage the whole estate he cannot afterwards set up another title as the subject of the mortgage, but where he mortgages only a reversion expectant, a totally different estate is not affected by the mortgage.

Then that brings the case to the construction of the covenant. The parties had the will of the grandfather before them, and they agreed that if the settlor came into possession of what they believed that will secured to him (though they mistook and misdescribed the real nature of * the estate) he should * 384 bring it into settlement. Nothing has become his under the will; and there is nothing which, by the covenant, he is bound to settle. The Lord Chancellor of Ireland seems to have proceeded on the supposition that there was something false or fraudulent in the representation of Osborne; but the facts do not warrant that supposition. The settlement expressly referred to the will, and that will was at the time in the possession of the father of the intended wife, and it was he who prepared the settlement.

[LORD WENSLEYDALE. — If there had been an action on this covenant, and an issue that this remainder under the will had never come into possession, the will must have been looked at, for the purpose of seeing what was meant.]

And that would decide the issue, by showing that Osborne had never undertaken to do what is now claimed.

Mr. Glasse and *Mr. Markham Giffard* for the respondents. — This is a question as to the construction of the covenant. Had it not the effect of a representation which, under the circumstances, constituted a contract binding the settlor? Was it the intention to settle the land, or merely the contingency of a particular title to

there arises an equity out of the original contract to pursue any new title which the mortgagor may acquire, so as to make that new title a substitution for the original title, the infirmity of which prevented the contract from being carried into execution." The Attorney-General made this difference the subject of remark.

it? It is not rational to suppose the latter with regard to a provision to be made for wife and children. There is a misdescription on the face of the deed as to the title of the settlor; and as he must be taken to have known his real title, he is bound, especially with regard to innocent parties, to make good what he then declared. The defence, that the lady's father knew the real nature of the title, is not supported by the evidence; but the appellant, who was the solicitor of the settlor, did know it, and before making the purchase now in dispute, actually took three opinions upon it.¹

* 385 * With the exception of *Tayleur v. Dickenson*,² all the authorities have one bearing. The earliest cases on the subject are *Taylor v. Debar*,³ and *Seabourne v. Powel*.⁴ In the latter of these, A. and his wife being assignees of a lease, mortgaged to B.; A. became insolvent, and the title not being good, C., in compassion to A.'s wife, made a lease to her. The Master of the Rolls (Sir J. Trevor) looked on this as but a graft on the old stock, and therefore directed the trustees to make a new mortgage of it to the mortgagee; in other words, he held that the new estate was liable to the old obligation. *Jennings v. Moore*,⁵ which adopted and confirmed that doctrine, was expressly founded on *Taylor v. Wheeler*,⁶ where it had been, not long before, expressly declared.

The cases of *Noel v. Bewley*,⁷ and *Tayleur v. Dickenson*,⁸ are undoubtedly opposed to each other, and cannot stand together. The authority of the former of these has never been impeached; it is on all fours with this case, if indeed it is not stronger than this, for there the conveyance was to secure a debt, while here it is to make provision for an intended marriage. It was decided three years after *Tayleur v. Dickenson*, and two years after the report of that case had been published, yet *Tayleur v. Dickenson* was not cited in argument or judgment. The other cases have no bearing upon the present. *Smith v. Baker*⁹ decided that where J. S. had made a conveyance to creditors, wrongly believing himself entitled to the fee simple of an estate, though the conveyance passed noth-

¹ These opinions were given in evidence in the cause, and were printed in the papers supplied to the House.

² 1 Russ. 521.

³ 1 Ch. Cas. 274.

⁴ 2 Vern. 11.

⁵ 2 Vern. 609.

⁶ 2 Vern. 564.

⁷ 3 Sim. 103.

⁸ 1 Russ. 521.

⁹ 1 Younge & C. Ch. 223.

ing, yet the transaction amounted to a contract which he was bound to carry into * execution. *Jones v. Kearney*¹ * 386 is chiefly valuable as containing observations on all the previous cases, except that of *Tayleur v. Dickenson*, which is not even cited, and which never appears to have been cited in any Court where a question of this kind has been discussed, and which must therefore be considered as having never received the approval of the profession.

On the principles stated in *Jorden v. Money*,² the representation here made must be taken to amount to a contract, and if so, though it may not be such a contract as would afford a ground of action, it will be binding in equity: *Logan v. Wienholt*³ and *Ex parte Wynch*.⁴ In the former of these two cases it was held that conditions in bonds entered into in consideration of marriage must be specifically performed, and cannot be satisfied by the mere penalty attached to them. If a man makes a representation as of fact, upon which another is to act, and that other does act upon it, the person who made it is bound by it, and must perform the contract founded upon it.⁵ If therefore a man is heir presumptive to an estate derivable from his father, and covenants in that character to convey, should his father die and leave him that estate by will, he will be bound to perform his covenant. The fact that he takes the estate under the will, and not by descent, will not relieve him from his covenant. He has agreed to convey the estate, and the mode of his coming into possession of it can make no difference in his agreement: *Otter v. Vaux*.⁶

The covenant here is to convey the estate which he expects * to possess. He describes himself in the recital as * 387 expecting to possess it in a particular manner; he there states that he is entitled to a particular estate; he must not be allowed to contradict the statement he has thus solemnly made; the declaration of his title at the time of entering into the covenant estops him from afterwards contradicting it, and this estoppel has peculiar force in a case in which the consideration for the covenant is marriage.

The Attorney-General, in reply. — All that was decided in *Otter*

¹ 1 Drury & War. 134, 1 Con. & L. 34.

² 5 H. L. Cas. 185, 210.

³ 1 Clark & F. 611.

⁴ 5 De G., M. & G. 188.

⁵ 5 H. L. Cas. 185.

⁶ 6 De G., M. & G. 638.

v. *Vaux*¹ was that a man could not free himself from his own covenant, but must make good his representations when they constitute a contract made for a valuable consideration. Here there was no such contract; the words were "when and so soon as the remainder becomes vested," which refer to the possession of the estate by one particular title and by none other; that is the covenant, and it cannot be controlled by the recital. A defeasible contingency was all that was here taken, and that contingency was defeated by the events which happened, events which resulted from the acts of other persons independently of the covenantor.

August 15.

THE LORD CHANCELLOR, after fully stating the covenant and the settlement and the will of Thomas Carr, said: In fact, my Lords, Richard Boyse Osborne was not entitled to any contingent remainder; all that he was entitled to was an expectancy as heir apparent in tail of his mother, and also as heir presumptive in tail of his aunt.

The gift in the will was substantially a gift to George Carr for life, with remainder to his first and other sons in tail, with remainder to his daughters as tenants in common, with *388 cross remainders among them; then, in default of *issue, to his two daughters, Elizabeth and Frances, as tenants in common in tail, with cross remainders between them, and an ultimate limitation to his own right heirs.

These lands were not fee-simple lands, but were merely lands held upon estates for lives, which your Lordships are perfectly aware is a very common sort of tenure in Ireland, and therefore the entail which was created is not strictly an entail, but that which, for want of a better word, has been always described as a *quasi* estate tail. These lands having thus come to these two ladies, Mrs. Osborne and Frances Carr, as tenants in common in what I may call a *quasi* estate tail, each of them executed a separate deed, the effect of which was to bar her estate tail and to make her absolute owner. If they had not been tenants of estates for lives, it would have made them absolute owners of the fee simple. But these deeds extended only to the lands of Stonehouse, and did not apply to the houses in Waterford.

The only subsequent alteration during the life of Elizabeth Osborne was that in 1828 these lives were renewed, and a new

¹ 6 De G., M. & G. 638.

lease was taken upon the surrender of the old lease ; and it may not be immaterial to state, that in the *habendum* of that new lease the lands were granted to Elizabeth Osborne and Frances Carr, to hold, with the appurtenances, to them, their heirs and assigns, in as large, ample, and beneficial a manner as they formerly held them before the grant of the new lease. The effect of that would be certainly at law to make those two ladies, not tenants in common, as they were before, but joint tenants. I do not think that that is material, but I have adverted to it in order to show that it has not been overlooked.

In 1830 Elizabeth Osborne died intestate ; and, consequently, every thing of which she was possessed in fee simple or *quasi* fee simple descended upon her son, Richard *Boyse Os- *389 borne, who was the settlor in that settlement of 1813. If she was only joint tenant, then those lands did not descend ; but the parties have treated them as if they did descend. I do not think that that in the result can be material, and therefore I shall so treat them. Indeed, probably the intention of the parties was not to alter their interests at all, and they took the same estate that they had before, namely, as tenants in common. Therefore, as to the lands of Stonehouse, immediately on the death of his mother Richard Boyse Osborne became absolute owner.

I shall proceed to consider the case with reference to Stonehouse in the first instance. In 1840 Frances Ann Carr died, and she made a will, whereby she gave every thing that she could give to Mr. Richard Boyse Osborne, who was her nephew ; it may be taken as an absolute gift to him of every thing, subject to certain annuities and legacies which she had given by her will. Therefore, inasmuch as she had been the absolute owner of a moiety of the lands of Stonehouse, for she had been joint tenant, and she had then become owner of the moiety, he became absolute owner, on her death in 1840, of that property, subject of course to all the charges which were created by her will.

Very soon after he had thus acquired the entirety of the property, he charged the whole of that property of Stonehouse with the annuities which had been given by the will of Frances Carr. If Frances was only the owner of a moiety, the annuitants had only the security of a moiety, but he by some arrangement which he made with the executors by that deed, charged the entirety in favour of those annuitants.

In April, 1850, he created a nominal annuity out of this property of Stonehouse, in trust for himself, and in October, 1852, he assigned Stonehouse to the present appellant, Mr. Smith, for valuable consideration.

* 390 * My Lords, with respect to the property in Waterford the case is different ; for there never was any deed executed by the two ladies Elizabeth and Frances for the purpose of barring the estate tail, or *quasi* estate tail, which they had taken in those two houses in Waterford. Therefore upon the death in 1830 of Elizabeth Osborne, Richard Boyse Osborne succeeded to her moiety as tenant in tail, or *quasi* tenant in tail under the original will. In 1834 he sold that moiety of the houses in Waterford to his aunt Frances Carr, who had in her own right the other moiety, and the probable effect of the deed of assignment which he executed was to bar any estate tail. In 1852 Osborne assigned the Stonehouse property to the appellant, and this cause petition was then presented.

The question therefore now is, whether, according to the true construction of this covenant, Richard Boyse Osborne was bound to convey on the trusts of the settlement the interest he eventually obtained in these estates. The doctrine of the Court of Chancery is, that if a man contracts to convey, or to mortgage, or to settle an estate, and he has not at the time of his contract a title to the estate, but he afterwards acquires such a title as enables him to perform his contract, he shall be bound to do so. This was the ground of the decision in the early cases of *Taylor v. Debar*¹ and *Seabourne v. Powel*.² The principle is well established, and the Lord Chancellor of Ireland considered that it was applicable to the present case and ordered accordingly.

But whether the principle is applicable to the present case depends on the question, what is the true construction of the covenant ? If the meaning of it be that Richard Boyse Osborne

* 391 covenanted at all events to bring * these lands into settlement, the doctrine may apply. But speaking with all deference to the Lord Chancellor of Ireland, I do not so interpret the covenant. The parties to the settlement evidently had a very imperfect knowledge of what the rights of Richard Boyse Osborne under his grandfather's will were. They describe it as a contingent remainder on failure of issue of George Carr. In truth it was no interest, properly so called, at all ; it was merely the right

¹ 1 Ch. Cas. 274.

² 2 Vern. 11.

of an expectant heir in tail. If indeed his mother had died in the lifetime of George, her brother, then her son, Richard Boyse Osborne, would have had a vested remainder in tail in a moiety expectant on the death without issue of his uncle George; and if his aunt Frances had in the same way died without issue in the lifetime of George, then, on the death of his mother and aunt, he would have had a vested remainder in tail in the entirety. But as both his mother and aunt survived George, he never had in truth any interest, except that of an expectant heir in tail.

The question therefore is, what is the real meaning of the covenant by Richard Boyse Osborne to settle that which the settlement describes as his contingent remainder on failure of issue of George Carr? I think the reasonable construction is, that he contracted to settle the estate and interest, whatever it might be, to which he might eventually become entitled under the terms of his grandfather's will, that is, that if that will had been left to take effect so as to make him tenant in tail in possession, he would convey the property to the uses of the settlement. If this be, as I am persuaded it is, the true meaning of the contract, I do not feel I am at all infringing the general doctrine of equity to which I have before adverted, when I arrive at the conclusion that the covenant in no respect bound Richard Boyse Osborne to settle

* what he derived, not under the settlement, but as heir of * 392 his mother, or as heir or devisee of his aunt.

And this was the nature of his interest in Stonehouse, for in the year 1824 the *quasi* estate tail in these lands was effectually barred, and Richard Boyse Osborne's subsequent title to them was derived, not under the will of his grandfather, but from his mother and his aunt. And his covenant can no more apply to these lands thus coming to him, than it would apply to any other lands which his mother and his aunt might have taken in exchange for them, or to the money produced by their sale, if they had sold them.

To hold that because he agreed to settle what he should succeed to under his grandfather's will, therefore he is bound to settle whatever interest he might derive *aliunde* in the same lands, is to make a new covenant for him, not to enforce that into which he actually entered.

This distinction was pointed out and acted upon by Lord Gifford in *Tayleur v. Dickenson*,¹ and if that case be inconsistent with *Noel*

¹ 1 Russ. 521.

v. *Bewley*,¹ decided by Sir Launcelot Shadwell (as to which I do not feel called on to express an opinion), I think the former is that which ought to be followed.

I think, therefore, that as to the lands of Stonehouse the order of the Lord Chancellor of Ireland was wrong.

But with regard to the houses in Waterford the case is different. The *quasi* entail in that property was never barred, either by Elizabeth Osborne or by Frances Carr. When, therefore, Mrs. Osborne died in 1830, her moiety in these houses descended on her son, Richard Boyse Osborne, and he became tenant in tail in possession. He became tenant in tail in possession of the * 393 other moiety on the death * of his aunt Frances, in 1840.

For I think the word "surviving," in the will of Thomas Carr, must be construed "other." I entirely approve of the rule now generally acted on, of giving to the word "surviving" its ordinary and natural meaning, and not construing it to mean "other." Courts have no right to alter the language of a testator, merely to effect what they conjecture him to have intended to say when that is at variance with what he has in fact said. But the words of a will, after all, are but the means of expressing the testator's intention, and where the intention is plain from the words themselves, it is then the duty of the Court to execute the intention, however inartificially expressed. And here the language shows that by the word "surviving" the testator must have meant "other." This is not a gift to a class, and on the death of one or more, to the survivor or survivors; but a gift to two designated devisees, that is, the testator's two daughters, as tenants in common in tail, and if either should die without issue, then to "the surviving daughter" and the heirs of her body. Unless the word "surviving" is to be taken here to mean "other," the intention cannot be carried into effect, for he means his gift over to come into operation if either of his daughters dies without issue, that is, on the death of the daughter who dies first, or of the daughter who dies last, and the latter object cannot be accomplished unless the word "surviving" shall be so read as to be rendered capable of being applied to the pre-deceasing daughter.

Add to which, the gift over to the testator's right heirs is only in default of "such issue"; that is, all such issue, which includes the issue of both daughters. I think it clear, therefore, that

¹ 3 Sim. 103.

Richard Boyse Osborne succeeded to both moieties of this estate as tenant in tail, under the limitations contained in his grandfather's will, and on this interest his covenant attached. It is not disputed that * when Mr. Smith, the appellant, became * 394 assignee of these houses he had notice of the covenant, and he is therefore bound by it.

The result is that the order below was right as to the houses in Waterford, but wrong as to the lands of Stonehouse. And the decree, therefore, must be altered by a declaration to that effect. That is the advice which I tender to your Lordships.

LORD WENSLEYDALE. — My Lords, there is a distinction between the two estates the subject of this suit. With respect to the Stonehouse estate, I think the Lord Chancellor of Ireland has taken an erroneous view of this case; probably because he thought himself bound to follow the last authority on this subject, *Noel v. Bewley*,¹ which, sitting in the highest tribunal of appeal, I am at liberty to say was, in my judgment, wrongly decided.

The question in the present case is a very simple one, and lies in the narrowest compass. What is the proper construction of the covenant in the marriage settlement; that is, what is the meaning of the words used in it, reading them in their ordinary and grammatical signification? And this question is precisely the same, whether the covenant is sought to be enforced in a Court of law to recover damages, or in a Court of equity to compel a specific performance of it.

Is this a covenant to convey the townlands of Stonehouse to the trustees absolutely, whenever the covenantor was entitled to them in possession? Or is it a bargain only with respect to the contingent interest, or *spes successionis*, or more correctly, a bargain to convey the estates, conditionally, if they should vest in possession in Mr. * Boyse Osborne, the covenantor under the will * 395 of the grandfather, Thomas Carr?

If the former is the meaning of the words used, then it is most certain that Mr. Osborne was bound to convey the estate, if he acquired it in any manner, whether it devolved on him under the will, or he obtained it in any other way, or if he purchased it himself. But if his covenant is to convey the estate, provided he acquires it by devolution in a particular manner, that is a con-

¹ 3 Sim. 103.

ditional contract, and is not obligatory unless the condition is performed.

Now, whether we read the covenant in the very words used, or in the manner in which it would be reformed according to the true intention of the parties, the title being evidently described as a contingent remainder by mistake, and there being no fraud, it is perfectly clear that the covenant to convey is only to take effect when an estate became actually vested in possession in the covenantor under the will of Thomas Carr; and that event never occurred with respect to the Stonehouse estate. The covenantor derived his title from his mother Elizabeth, and his aunt Frances, the daughters of the testator, who cut off the *quasi* entail of this estate, so that it did not descend to him in that way either from his mother or from his aunt.

It is said for the respondent that the parties must have intended by the covenant to stipulate some certain provision for the children of the marriage, and not a contingent or uncertain one, and that it was wholly immaterial in what way Mr. Boyse Osborne might become possessed of the estate, if he did become possessed of it, and that therefore the covenantor was bound to convey it to the trustees. But that is to apply a wrong rule of construction. It is to interpret the covenant, not according to the meaning of the words used, but according to what the parties may be reasonably supposed (judging from the circumstances in which they were placed) to have been likely to intend to do when they entered into the contract. It is a perversion of the meaning of the word "intention," when it is stated to be the rule of construction of wills or other instruments. It is a mere matter of conjecture what the parties intended in this sense of the word. Who can say in this case that if the father of the lady had asked the settlor to covenant to convey the estate if he should acquire it from his mother, or if he bought it from another person, he might not have stipulated for a larger portion than 5000*l.* with his wife?

This is a mere speculation and must be rejected altogether. The only safe rule of construction is to ascertain the meaning of the words used, and in this case I think it is too clear to admit of any doubt.

It was very ingeniously argued at the bar, by Mr. Giffard, that in this case the settlor was estopped by the recital in the deed from saying that he had not a contingent remainder on failure of issue

of George Carr, and, if so, that George Carr, having died without issue, the remainder became vested, and he was bound to convey. That a recital of another deed will estop is not to be doubted: *Lainson v. Tremere*,¹ and therefore at law the covenantor would not be permitted to plead that he had not a contingent remainder. But the recital does not appear to me to confine the contingency to the simple case of George Carr dying without issue, and therefore, if there had been an issue in pleading, whether the remainder became vested or not, it seems to me that it would be necessary to look at the terms of the will itself to ascertain what was the contingency on which the remainder depended; and then it would be seen that there was no contingent remainder at all, and there * would be great difficulties in the way of the plaintiff * 397 in the action succeeding. Be that as it may, the mistake, it being clearly such, fraud being out of the question, would be corrected in equity, and the covenant reformed, and then the deed would only recite the *spes successionis* under the will, and the covenant would be for the settlor to convey the estate when it became so vested in him.

I think it clear, therefore, that under this covenant the settlor would not be bound to convey this estate unless he became entitled, which he never did, by virtue of the grandfather's will, and having acquired a title *aliunde*, he was not bound to convey.

In such cases as this, which depend on the construction of the words of the covenant, it is of little use generally to refer to precedents. In the case of *Tayleur v. Dickenson*,² before Lord Gifford, the words were different, and his Lordship very properly held that the covenant to convey applied only in case the wife became entitled under the limitations of the settlement, and not if she acquired the estate in a different way. This case is material only, and that in a very slight degree, for the purpose of showing that there was no mention made of any supposed rule of equity obliging the covenantor to convey otherwise than according to the true meaning of his contract.

The case of *Noel v. Bewley*,³ before the Vice-Chancellor of England, was cited, and greatly relied upon, for the respondent, and appears, as I have said, to have weighed much with the Lord Chancellor of Ireland in inducing him to decide against the appel-

¹ 1 A. & E. 792.

² 3 Sim. 103.

³ 1 Russ. 521.

lant, and undoubtedly it would, if properly decided, justify this decree. In that case, Sir Charles Blunt, being indebted to * 398 Noel and Company, by indenture, * reciting the will, under which he was entitled to a contingent remainder expectant on the decease of his mother, in the event of his surviving her, conveyed that contingent remainder to trustees for Noel and Company, with a covenant for further assurance, by way of security, for a debt due to them. Sir Charles Blunt's mother afterwards barred the contingent remainder, and then by her will left an interest in the same estate to her son, Sir Charles Blunt. A bill was filed to compel Sir Charles Blunt to convey that interest to the plaintiffs under the covenant for further assurance. The Vice-Chancellor of England at first expressed an opinion, that the covenant for further assurance applied, and that by virtue of it, as the contingent remainder was destroyed, and Sir Charles Blunt received a different interest in lieu of it, he was bound in equity to make good his covenant. The Vice-Chancellor subsequently, however, declared that he did not place much reliance upon that covenant for further assurance, and no doubt rightly, for that covenant would not oblige the covenantor to convey a different thing from that which he had covenanted to convey, or the same thing on a different event. The Vice-Chancellor then declared that the law was, that if a person had conveyed a defective title, and afterwards acquired a good one, the covenant would render that good title available to make the conveyance effectual. This, no doubt, was true, if the person had agreed to sell and convey an estate absolutely in the first instance; then if he had no title at the time of the contract, and afterwards acquired one, he would be bound to make good his contract, and to convey it; but if he never covenanted absolutely to convey, but only conditionally, and the condition was never fulfilled, he was under no such obligation.

It was clearly a mistaken application on the part of the * 399 Vice-Chancellor of an established * rule to a case to which it was not applicable, and, in my judgment, the case was on that account wrongly decided, and is of no authority.

But a different question arises as to the estate in New Street, in the city of Waterford. The will of Thomas Carr, 22d January, 1773, left the estates of Stonehouse, and the property in New Street, Waterford, both held under estates for lives renewable for ever, to his son, George Carr, for life, with remainder to his first

and other sons in tail, then to daughters as tenants in common, and for default of such issue, to his daughter Elizabeth, afterwards Osborne, and Frances, as tenants in common, and the heirs of their respective bodies; if either should die without issue, then to the surviving daughter, and the heirs of her body, and the ultimate remainder in fee to his own right heirs. And as the *quasi* entail in the New Street property in Waterford was not cut off, the moiety belonging to Elizabeth descended, under the will, to Mr. Osborne, and is affected by the covenant in the marriage settlement; and the appellant, in his answering affidavit, offers to convey that part to the uses of the settlement. The decretal order, therefore, was right as respects that moiety of the Waterford property.

As to the other moiety there is some little question. On the death of either without issue, the moiety of each daughter was to go to the surviving daughter and the heirs of her body. If the word "surviving" is to be read as "other," as I think here it ought to be, then the moiety of Frances Anne would go to Mr. Osborne, as heir of the body of his mother, and this moiety would come to him under the will, and be affected by the covenant.

If the word "surviving" is to be construed literally, then the event never took place; neither sister died without issue leaving the other sister surviving, and the remainder in * Frances Anne Carr's tail in the moiety did not pass by * 400 the will, but descended to the heir at law as being undisposed of. This would be to create an intestacy as to that remainder. My opinion therefore is, that the word "surviving" is to be read as "other," in conformity with the opinion of my noble and learned friend on the Woolsack, and then the whole interest in each moiety is disposed of, and both the moieties in the Waterford estate descended on Mr. William Boyse Osborne under the will of his grandfather Thomas Carr, and were therefore bound by his covenants in the settlement.

I therefore entirely concur in the opinions expressed by my noble and learned friend.

The Attorney-General. — I would humbly submit to your Lordships that the order of the House should run in the following terms: Declare the respondents entitled to the specific performance of the covenant contained in the settlement so far as the same relates to the houses in Waterford, but not entitled to specific per-

formance of the covenant so far as the same relates to the lands at Stonehouse. And that the cause petition so far as it prayed any relief with respect to the lands at Stonehouse ought to be dismissed. And reverse so much of the decree as gives any relief with respect to the lands at Stonehouse, and as directs the appellant to pay to the respondents the costs of the petition. And with that order and with those directions remit the cause to the Court below.

THE LORD CHANCELLOR. — Precisely ; I think nothing can be said about costs. On the one hand, the petitioners asked too much, and on the other hand, Mr. Smith offered too little. If he had offered to settle the whole of the Waterford property I * 401 should have been of opinion that he was entitled * to have his costs, but he only offered to settle half. Therefore the declaration will be to the effect suggested by the Attorney-General. The costs paid by the appellant in the Court below must be returned.

Decree in part reversed, and cause remitted, with declaration and directions.

Lords' Journals, 15th August, 1857.

ERNEST v. NICHOLLS.

1857. June 8, 9 ; August 15.

HENRY ERNEST (official manager of the Sea Fire Society),	} <i>Appellant.</i>
EDWIN COX NICHOLLS (official manager of the Port of London Company),	
	} <i>Respondent.</i> ¹

Winding-up Act. Registered Company. Directors' Contract. 7 & 8 Vict. c. 110. Costs.

A disallowance by the Master of a claim made under the Winding-up Acts is the subject of an appeal.

There can be no remedy against a company registered under the 7 & 8 Vict. c.

¹ New Brunswick & Canada Railway Company v. Conybeare, 9 H. L. Cas. 719.

110, on any contract, in which a director of the company was a party, and in which he was interested, unless the provisions of the 29th section of that statute have been strictly observed.

A contract by the directors of one company to purchase the trade of another company is not binding, unless it is authorised by the deed of settlement of each company, and is made according to its provisions.

Quære. Whether when directors have entered into a covenant which is void, their company can be liable for acts done in consequence of such covenant? What are the powers of directors?

Each company was ordered to pay its own costs.

THIS was an appeal against a decision of the Lords Justices, which had reversed one previously pronounced by Vice-Chancellor Stuart, in the matter of a claim under the Winding-up Acts, 1848 and 1849. The appellant represented "The Sea Fire and Life Assurance Society," and the respondent "The Port of London Shipowners' Loan and Assurance Company."

* The Port of London Company was completely regis- * 402
tered in April, 1847. By the deed of settlement of the company the business was to insure, against the perils of the seas, fire, and all such other risks as the directors should think fit, the ships, goods, freight, &c. of the shareholders, and likewise of others, and all other matters which might lawfully be insured against such perils, and to advance money on bottomry and respondentia, and to carry on commission business, and all other matters connected with ships, or incidental thereto. There was no power in the deed to carry on the business of fire and life assurance. Mr. Augustus Collingridge was, by the fifty-third clause of the deed, appointed managing officer of the company. The managing officer might or might not be a director. His duties were (clause fifty-four) to keep the books, to keep the common seal of the company, and when thereto required by the directors, and in the presence of any two of them, to countersign cheques on the company's bankers, and to affix the seal of the company to instruments requiring the same, and to receive and prepare, and if necessary present to the proper parties, all writings required in transacting the business of the company. The ninety-seventh clause of the deed thus provided for the possible dissolution of the company:—

If a resolution for that purpose should be reduced into writing, and should be twice read, and put to the vote, and should be carried by a majority of at least two thirds in number of the shareholders present, holding among them at least two thirds in number

of the shares of the company, at an extraordinary general meeting, and if such resolution should be confirmed by a like majority at a subsequent extraordinary general meeting, to be held after the expiration of fourteen days, but before the expiration of three calendar months next after the general meeting at which

* 403 * such first resolution should have been passed, then the said company should be dissolved.

There was no clause authorising the directors or the managing officer of the company to sell or dispose of its business. Mr. Collingridge and Mr. Bolton Peel, the treasurer, certified the deed, adding to their names the words "two of the directors."

In February, 1849, "The Sea Fire Life Assurance Society" (at first called "company") was formed, and was provisionally registered as the "society" on the 16th of July in that year. The deed of settlement defined the business of the society to be, to make insurances and advances on ships (as in the other deed), and also to make and effect all insurances on lives or survivorships, or on all or any contingencies, &c. relating to or connected with the lives or survivorships which might be effected according to law, and also to grant and to purchase and sell endowments, annuities, either for lives or for years, or on survivorships, and either immediate, deferred, reversionary, or contingent, and also life, reversionary, and other estates and interests, real or personal, and to advance money by way of loan on mortgage or other security, and for these purposes to acquire and hold such lands, hereditaments, and real estates as might be requisite, and to carry on the business of life assurance generally, and of any annuity, endowment, loan, and reversionary interest association, in all their respective branches and departments; and also to make or effect assurances against loss or damage by fire to all kinds and descriptions of property whatsoever, and to carry on the business generally of a fire insurance office, as far as the same might be done according to law; and also to make, issue, and effect policies of insurance

needful for the purpose of securing the fidelity of persons

* 404 in situations of * trust, and generally to carry on the business of a guarantie association in all its branches, so far as

the same might be done according to law. It was declared that there should not be less than three nor more than ten directors of the society, and Alexander Davis, Sir William Ogilvie, Bart., Augustus Collingridge (the same person who was the secretary

and a director of the London Port Company), and Howel Gwyn, were appointed the first directors. The directors were (clause twenty-seven) to meet at the society's office once a month, or at any other time that two directors or the managing officer should by writing appoint; and every such meeting was to be called a board of directors. The managing officer (clause twenty-eight), whether director or not, was entitled to be present, but no other person not a director, and three or more were to constitute a meeting and exercise all the powers of the board. By clause thirty-one, the directors were to cause the society to be completely registered, and should thereon be entitled to all the powers conferred on directors by the Registration Act, except as thereafter provided, and after complete registration, they should have full authority to purchase or lease, as might seem expedient, at such price and on such terms and conditions as might be lawfully imposed, the business of any other fire, life, or marine insurance company, and for that purpose to enter into, and rescind or modify contracts and agreements in the name of the Sea Fire Life Assurance Society, and of the shareholders thereof. A managing officer, who might or might not be a director, was (clause fifty-three) appointed, and Mr. Collingridge was thereby appointed the first managing officer of the company. His duties were described in much the same terms as in the other deed. The deed was certified by Mr. Davis and Mr. Collingridge, who were described as "directors."

* In February, 1849, Mr. Collingridge and Mr. Alands *405 (the chairman of the Port of London Company) delivered to Mr. Chapple, the solicitor of that company, in writing, instructions, signed by them, to prepare a deed for the amalgamation of the Port of London Company with the Sea Fire Company, which was then provisionally registered in that name. This registration appears never to have been completed, but a provisional registration of this company, under the name of "society," took place in July, 1849, and was completed on the 8th October, 1849. No meeting of the shareholders had been held, to authorise the directors of either company to sell, or to purchase, the business of the other; but the arrangements for the transfer of the business of the Port of London Company to the Sea Fire Society were stated to have been made by the directors of the two bodies before the complete registration of the society. The accounts and books of

the Port of London Company were balanced and closed up to the 30th of June, 1849, and the balances due from the several agents of the company were transferred to the books, and received by the officers of the society. On the 11th October, 1849, a deed of transfer was executed : it expressed that the Port of London Company, in consideration of 10*s.*, and of the covenant on the part of the Sea Fire Society thereafter contained, assigned to the Sea Fire Society all the trade and business of general marine assurance, and all other the trade or business, if any, of the Port of London Company, and the good-will and capital, stock, and book and other debts, and property and effects thereof respectively, and all benefit and advantage thereof respectively, and all books, papers, and accounts of and relating to the said business. And

the Port of London Company covenanted to give public
 * 406 notice of the assignment thereby made, and that the * said company would not at any time thereafter carry on the business of marine insurance in any of its branches. And in consideration of the assignment and covenant thereinbefore contained on the part of the Port of London Company, the Sea Fire Society covenanted to indemnify the Port of London Company, and the past and present shareholders therein, and the estate and effects of such shareholders, against all actions, suits, costs, charges, damages, expenses, and consequences whatsoever which then were or should or might thereafter be instituted, prosecuted, sustained, or occasioned, or which the said last-mentioned company, or any of the shareholders thereof, should be put unto, by reason of any claim or demand which was or might thereafter be made against the said last-mentioned company, whether in respect of any policy of assurance and promissory or credit note respectively, made and issued by the company, or on any other account or pretence whatsoever.

The deed was engrossed in duplicate, and the duplicates were interchanged. The Sea Fire Society's duplicate was, in the subsequent proceedings, produced before the Master ; it bore the signatures, " Alexander Davis," " Wm. Ogilvie," who were described as " directors of the Sea Fire Life Assurance Society," and the seal of that society was impressed upon it. The Port of London Company's duplicate was not produced, but it was assumed throughout to have been executed by three directors, of whom Mr. Collingridge was one. A witness named Ashford, who had

acted as accountant, was examined. He was asked, "Was there any notice given of the assignment of the one business to the other?" and answered, "I do not think there was; I think it was all done between Mr. Davis and Mr. Collingridge; and, if I recollect, Sir W. Ogilvie was called *in." He was cross *407 examined: "By whose direction was this transfer of July, 1849, made?" "I only received a notice from the managing director, Mr. Collingridge." "There was no board meeting, or any thing of that sort?" "No."

After the transfer, the society had possession of all the books and papers of the company, and all business was transacted in the name of "The Sea Fire Society."

Certain claims connected with this business having arisen against the London Port Company, a petition was presented, under the Joint Stock Company's Winding-up Acts, 1848-49, for the winding up of the company; and the respondent was, in January, 1850, appointed official manager under that petition. A similar petition having been afterwards presented in the matter of the Sea Fire Society, the appellant was, in June, 1850, appointed official manager of the society. Debts having been proved against the Port of London Company, the official manager thereof carried in a claim arising therefrom against the Sea Fire Society, to the amount of 5856*l.* 11*s.* 6*d.* Both the company and the society were in the office of Master Tinney. On the 17th November, 1853, the Master disallowed this claim. The matter was reheard by him with the same result. The official manager of the Port of London Company then moved, before Vice-Chancellor Stuart, to reverse the Master's decision. This motion was heard 22d April, 1854, and was refused, with costs. The official manager of the Port of London Company then moved, before the Lords Justices, to discharge the order of Vice-Chancellor Stuart, and to reverse the decision of the Master, when their Lordships, being of opinion that the Sea Fire Society was bound to indemnify the Port of London Company, according to the covenant contained in the deed of assignment of the 11th October, 1849, made an * order ac- *408 cordingly.¹ This was an appeal against that order.

Mr. Bacon and *Mr. Freeling* for the appellant. — The deed of 11th October, 1849, is inoperative and void, being made entirely

¹ 5 De G., M. & G. 465.

without authority ; but even if made with authority, the deed cannot be supported, for it is not a fair and equitable transaction, such as the directors of the Port of London Company could enter into with regard to their shareholders. Directors are trustees for their shareholders, and have no power whatever beyond what is given them by their deed of trust: *Bryson v. The Warwick and Birmingham Canal Company* ;¹ *The Aberdeen Company v. Blakie*.² As to authority, the deed of the Port of London Company gave the directors power to conduct the business of the company, and to deal with its funds so far as the business of the company required, but it gave no authority whatever to transfer that business to another company. That could not be presumably in the power of the company. So that even according to *The Royal British Bank v. Turquand*,³ the act of the directors here was void.

[LORD WENSLEYDALE. — Was the 29th section of the 7 & 8 Vict. c. 110,⁴ referred to in the Court below ?]

*409 * It was not ; nor was there any proof that the deed of transfer, either before or after its execution, was sanctioned at any meeting. It was the act only of certain directors. One of them was Mr. Collingridge, and the fact that he was the managing officer and a director in both the company and the society, disqualified him from taking any part in the matter. Without him, the transfer was made only by two directors, who by the terms of the deed could not constitute a board. Every thing, therefore, that was done after July, 1849, was void.

¹ 4 De G., M. & G. 711.

² 5 Ellis & B. 248.

³ 1 Macq. Scotch App. 461.

⁴ That section enacts, that "if any director of a joint stock company registered under this act be either directly or indirectly concerned or interested in any contract proposed to be made by or on behalf of the company, whether for land, materials, work to be done, or for any purpose whatsoever, during the time he shall be a director, he shall, on the subject of any such contract in which he may be so concerned or interested, be precluded from voting or otherwise acting as a director ; and if any contract or dealing (except a policy of assurance, grant of annuity, or contract for the purchase of an article or of service, which is respectively the subject of the proper business of the company, such contract being made upon the same or the like terms as any like contract with other customers or purchasers) shall be entered into in which any director shall be interested, then the terms of such contract or dealing shall be submitted to the next general or special meeting of the shareholders to be summoned for that purpose, and no such contract shall have force until approved and confirmed by the majority of votes of the shareholders present at such meeting."

[LORD WENSLEYDALE referred to *Ridley v. The Plymouth, &c. Grinding Company*,¹ and *The Kingsbridge Flour Mill Company v. The Same*,² and to *Smith v. The Hull Glass Company*.³]

Those cases show that parties must be presumed to know the provisions in the deeds of settlement, and that is peculiarly applicable to the directors of the companies themselves.

The Attorney-General (Sir R. Bethell) and *Mr. Roxburgh* for the respondent. — The Port of London Company is entitled to the benefit of this covenant. The course here has been mistaken. * This demand might possibly have been admitted * 410 as a claim, but not as a debt, and then a bill might have been filed to set aside the deed of 1849. The validity of that deed might have been tried in another form of proceeding, but not in this.

[THE LORD CHANCELLOR. — Their argument is, that the deed is absolutely illegal, and that no action could be maintained upon it.]

[LORD WENSLEYDALE. — And that you have no legal right to sue, and consequently none to claim.]

That is not a question which can be tried in a proceeding under the Winding-up Acts. The 50th section of the 11 & 12 Vict. c. 45, applies to claims of a decided, not of a doubtful nature, nor can the latter be tried in the form of proceeding constituted by that statute, which never was meant to decide a question of legal title. The 57th section of that Act which clearly refers only to judgments already entered up, shows this, and the 58th section provides that the Act is not to affect existing contracts, nor the rights and remedies of creditors of or debtors to the company, whether contributories or not. The object of the Act was to deal with contributories among themselves alone, and not to decide between them and third parties.

[LORD WENSLEYDALE. — The 75th section says, as to demands due from or against the company: "The Master shall either allow or disallow, or allow as claims only, such demands according to the nature of the case, and of the proof adduced or exhibited before him." That is an exercise of jurisdiction over the claim itself. Here the Master has disallowed the claim, and that disallowance has been reversed by the Lords Justices.]

¹ 2 Exch. 711.

² 11 C. B. 897.

³ 2 Exch. 718.

But that power of allowance or disallowance does not depend on whether the claim is matter which would sustain
 * 411 * a suit in equity or an action at law. It depends on other matters alone.

[LORD WENSLEYDALE. — I do not agree with your construction of the Act. The Master is to decide on claims, allowing or disallowing them, subject to an appeal to the Vice-Chancellor and to the Lords Justices. If this was a question under the bankrupt law it would be tried in the Court of Bankruptcy. If the Commissioner of Bankrupts was to reject the proof as here, what remedy would you have but that of appealing to the Vice-Chancellor ?]

He must of course have power to allow or disallow a demand, but that power must be interpreted with reference to the object of the statute. He cannot do that which is equivalent to setting aside a deed. The object of the statute was to settle rights and liabilities as among the members of a company, not the rights of third persons. To lay down a different rule would be to transcend in an extraordinary way the limits within which Courts acting under the Winding-up Acts have hitherto restrained themselves. Suppose there is a common decree for creditors, the Master cannot investigate into the merits of a claim and see whether it was the subject of a fraud, nor can he determine on the validity of a debt. He may admit or reject a debt, but not on the ground of the nature of the debt itself. That is a question for a different tribunal. The order of the Lords Justices is right, as being an order *simpliciter* to allow the claim. The whole question of jurisdiction is by their order kept inviolate. The Act certainly did not intend to confer any judicial power on the Master; he has not the means of doing justice between the parties. Such was the opinion of Mr. Justice Maule who, sitting with Vice-Chancellor Stuart in a

case arising out of the affairs of this very society, *Ex parte*
 * 412 *Gwyn*,¹ * said: "The argument which has been addressed to the Court in support of the claim would, of itself alone, and without the assistance of the argument which has been urged against it, be quite sufficient to convince me that this is not a case in which the Master ought to have taken away the right of either party to have the matters of fact as well as of law put in issue and dealt with by the constitutional tribunal, a Court of common law, with an appeal to the House of Lords to decide matters of

¹ 1 Jurist, N. S. 300.

law, and a jury to decide matters of fact." The principle there stated ought to have been acted on in this case. The Master has no such jurisdiction as he has here exercised.

In what way was Collingridge interested in the contract any more than any other of the directors? He had no personal interest apart from the shareholders. If the construction now suggested is to be put on the twenty-ninth section, the directors never could enter into any contract whatever without the concurrence of a general meeting. It is no objection to Collingridge that he was a director in each company, unless he has an interest apart from his capacity of director, that is, an individual interest different from his interest in the company.

[LORD WENSLEYDALE. — The twenty-ninth section of the 7 & 8 Vict. operates in a double way. It prevents Collingridge from acting as a director in a matter in which he has an interest, and it annihilates his character of director of either body, because he has an interest in the other, and then there are but two persons present to make the contract, when the deed requires three.]

The Sea Fire directors had the power to buy the business of another company expressly conferred upon them, and having exercised that power they cannot now say that the other party had no power to sell. They are estopped from denying their own authority, and, on that ground, objecting * to the validity * 413 of the deed. The members of that society are the grantees under that deed; they have entered into the possession and enjoyment of all that it purported to convey, and having exhausted all its advantages, they cannot now ask to be freed from its liabilities on the ground of the incapacity of the grantor to make the grant. Equity will not permit such a proceeding, for the grantors (the directors and members of the Port of London Company) cannot be restored to the same condition as before. The form of the grant is regular; it is either signed by two directors, which is sufficient under the forty-sixth section of the 7 & 8 Vict. c. 110, or by three directors, as required by the deed of settlement, for Mr. Collingridge was by that very deed appointed one of the directors as well as the managing officer.

[LORD WENSLEYDALE. — In an action it would be competent for the defendant to plead that the deed of transfer had not been executed according to the deed of settlement.] But that has not been done here, and, if done, the defendant must have produced the

minute books, which would have shown the resolutions both of the Sea Fire directors who had express power to contract, and of the directors of the Port of London Company approving of what was done.

Mr. Bacon, in reply, first as to the jurisdiction of the Master. — [THE LORD CHANCELLOR. — We are all of opinion that you need not trouble yourself on that point. What we want to be satisfied of, is whether the Master ought to have received this deed as proof of a debt.]

The claim before the Master was founded on the deed alone, and the objection now made arises on the evidence which the directors of the Port of London Company adduced. They here had *414 no power to make this contract, * they were not authorised to do so by their deed of settlement, or by the resolution of any general meeting, and they themselves were by the 29th section of the 7 & 8 Vict. c. 110, precluded from voting upon it; even if the signatures of two directors alone would have been sufficient under the 46th section of that statute.

THE LORD CHANCELLOR, after stating the circumstances of the case, said: The question turns entirely, in my view of the case, upon the validity of the covenant of indemnity which is contained in that deed of transfer to which I have already called your Lordships' attention.

Your Lordships will observe that the transaction in question was a purchase by the one company of the good-will and the whole concern of the other. That would, ordinarily speaking, be a transaction in which no company would be justified in engaging, because it certainly cannot be said to be within the ordinary scope of the object of any company to purchase the good-will of another. But all question upon that head is removed by a clause that there is in the deed under which the Sea Fire Assurance Society was constituted, and which expressly authorised such a transaction. I allude to the thirty-first clause of that deed, in which it was stipulated that the directors should cause the company to be registered; and thereupon they shall be entitled to certain privileges, and, amongst other things, shall have "full power and authority to purchase or lease," "at such price and on such terms and conditions as may be lawfully imposed, the business of any other fire, life, or

marine insurance company ; and for that purpose to enter into and rescind or modify contracts." Under that power it was that the Sea Fire Assurance Society purchased the business of the Port of *London Company, and the deed in question *415 was a deed executed for carrying into effect that sale and purchase.

The deed produced is sealed with the seal of the Sea Fire Society, and signed by two directors of that body, gentlemen of the names of Davis and Ogilvie. The twenty-eighth clause in the deed of settlement provides, that three directors shall be sufficient to constitute a meeting, "and shall be competent to exercise the several powers and authorities hereby conferred upon the directors generally."

One question that was raised below was, whether, upon the evidence, it was reasonably to be inferred that three directors were present at the meeting when those two directors signed the deed ; for unless there were three present, it was argued, that the deed, not being according to the provisions of the twenty-eighth clause, would have been invalid. The Lords Justices came to the conclusion, that that ought to be decided as a question of fact in the affirmative, and that it ought, upon the evidence, to be taken to be sufficiently proved, or that, as a matter of inference, it ought to be assumed that there were three directors present ; and that therefore there was no objection on that ground.

Now, I do not give any opinion as to whether or not the Lords Justices were right upon that point ; whether the evidence did or did not warrant the conclusion that, besides those two directors, there was another present, so as to make three directors present ; and therefore in that respect to make this in conformity with the deed of settlement. But what is plain is this, that the deed was invalid upon other grounds (so at least it appears to me) ; I mean, invalid upon a ground which does not appear to have been called to the attention of the Lords Justices, namely, that there is one stipulation which is contained in the 7 & 8 Vict. c. 110, § 29, which has not been complied with, and * which is a *416 provision, not of form, but one entirely of substance. I should state, that both the society and the company were constituted under the Joint Stock Company's Act, and were not formed by special Acts of Parliament or by Royal Charter. By the twenty-ninth section of that statute it is enacted : —

[His Lordship read the section ; see *ante*, p. 408 n.]

Now, my Lords, it appears to me to be perfectly clear that there can be no remedy, either at law or in equity, against a company upon any contract entered into in which a director of the company was a party, and in which he was interested, unless the terms of that clause have been complied with, and that not upon any ground or matter of form, but one entirely of substance.

It was an admitted fact, that a gentleman of the name of Collingridge, who was one of the directors of the Sea Fire Society, must be assumed to have been present on that occasion. If he was not present, the deed would be invalid upon another ground ; but, supposing he was present, he would be a party interested, and, being a party interested, it would not be competent to him by his presence to give validity to the transaction ; and not only would it not be competent to him to give validity to it, but the transaction would be altogether invalid, a director having been a party, until the matter had been brought before a general meeting and approved.

It appears to me, upon this short ground, which, so far as I can collect, was never brought under the cognizance of the Lords Justices, that the whole transaction was invalid ; and, without going into the question which was discussed before the Lords Justices, upon that short ground it is plain that the claim cannot be supported. This is an objection from which it is impossible that the respondent can escape ; and therefore, upon this short * 417 ground, I * think that the decision of the Lords Justices must be reversed.

LORD WENSLEYDALE. — My Lords, in this case I think it my duty to advise your Lordships to reverse the order of the Lords Justices.

A preliminary objection was taken, on the part of the respondents, that the order to refer back the claim of the official manager of the company to be allowed to prove against the society was not the subject of appeal, nor could the disallowance of the Master be such. I am clearly of opinion, that this objection is untenable. The shareholders in the appellant society are injured by the allowance of a claim which ought not to have been allowed, because they are liable to be called upon by the official manager to con-

tribute a large amount as a provision for the payment of it; and the claimants are prejudiced if their claim is rejected, as they lose the benefit of having money raised to that amount from the contributories to the society.

I think the order of the Lords Justices is wrong, because, in the indenture of the 11th October, 1849, conveying the business of the Port of London Company to the Sea Fire Society, the covenant to indemnify was not obligatory on the latter, but void by the provisions of the 7 & 8 Vict. c. 110, § 29, which do not appear to have been adverted to in the argument, or in the judgment of the Court below.

The principles of law upon which the liability of joint stock companies is to be decided, as far as is necessary for the decision of this case, are very clear and perfectly settled, though not always in practice steadily kept in view. The law in ordinary partnerships, so far as relates to the powers of one partner to bind the others, is a branch of the law of principal and agent. Each member of a * complete partnership is liable for himself, and, *418 as agent for the rest, binds them, upon all contracts made in the course of the ordinary scope of the partnership business. The want of due attention to this rule in applying it to future conditional partnership, and to other associations, such as that of provisional committees, has been productive of frightful loss of property in our own time, until ultimately corrected by the decisions of the Courts below and of this House.

Any restrictions upon the authority of each partner, imposed by mutual agreement amongst themselves, could not affect third persons, unless such persons had notice of them; then they could take nothing by contract which those restrictions forbade. A corporation by common law could only bind itself by contract under the common seal (a necessary incident by the common law to all such corporations), except in some slight matters of service. The Court of Queen's Bench has lately given effect to contracts by companies having a royal charter only; but the difference between a corporation at common law and one created by Parliament, where it has not all the powers expressly or impliedly given by the Act, does not appear to have been presented to the consideration of the Court.

It is obvious that the law as to ordinary partnerships would be inapplicable to a company consisting of a great number of individu-

als contributing small sums to the common stock, in which case to allow each one to bind the other by any contract which he thought fit to enter into, even within the scope of the partnership business, would soon lead to the utter ruin of the contributories. On the other hand, the Crown would not be likely to give them a charter which would leave the corporate property as the only fund to satisfy the creditors.

The Legislature then devised the plan of incorporating * 419 * these companies in a manner unknown to the common law, with special powers of management and liabilities, providing at the same time that all the world should have notice who were the persons authorised to bind all the shareholders, by requiring the copartnership deed to be registered, certified by the directors, and made accessible to all; and, besides, including some clauses as to the management, as in the Act 7 & 8 Vict. c. 110, § 7, &c. All persons, therefore, must take notice of the deed and the provisions of the Act. If they do not choose to acquaint themselves with the powers of the directors, it is their own fault, and if they give credit to any unauthorised persons they must be contented to look to them only, and not to the company at large. The stipulations of the deed, which restrict and regulate their authority, are obligatory on those who deal with the company; and the directors can make no contract so as to bind the whole body of shareholders, for whose protection the rules are made, unless they are strictly complied with. The contract binds the person making it, but no one else.

Those provisions which give to the directors discretionary powers of management, do not affect strangers; and the shareholders are bound by the exercise of the discretion which they have consented to give. Other stipulations are directory merely, and do not constitute conditions to the exercise of the powers; but they form the subject of an action against the directors for the breach of their covenants expressed or implied in the deed. The great body of shareholders for whose protection these limitations of authority are provided cannot be affected unless they are complied with. They can only act and contract through their directors, and the acts of the individual shareholders have no effect whatever on the company at large.

That this is the law has been fully settled by several * 420 * decisions. The first is *Ridley v. Plymouth, Stonehouse*

and *Devonport Grinding and Baking Company*; ¹ and the next is *The Kingsbridge Flour Mill Baking Company v. Ridley*.¹ These cases decide that the creditors can render the company liable only on contracts made with the directors according to the deeds.

These cases were followed by *Smith v. The Hull Glass Company*.² On the first trial of that case, the plaintiff failed; but the Court of Common Pleas granted a new trial, on the ground, as stated by Lord Truro, that the defendants might be treated as a partnership of ordinary persons; the directors being partners with power to bind in the ordinary course, and the deed not having been produced at the trial, there was sufficient evidence to make the company liable in the first instance. I do not stop to inquire whether the Court was right in assuming that the action was against individuals, the terms in which the defendants were described plainly intimating that they were a corporation either at the common law or by the Joint Stock Companies Act, and therefore incapable of being bound, except by their common seal, or according to that Act. On the new trial the deed was put in, and the Court was then ³ of opinion on a special case stated, that the company was bound only by the contracts made by the directors within their authority, and that all the persons who contract with directors must be taken to be cognizant of the extent of it, but that, in the particular case, the company was bound to pay for goods ordered by the manager, appointed by the directors, who was authorised to conduct the manufacture, because he had an implied power to order goods for that purpose by the deed itself; and the goods ordered by the chairman, deputy * chair- * 421 man, and secretary were delivered on the premises; and in the special case, the Court presumed this to have been seen and authorised by the directors.

Whether that presumption was right is of no consequence for the present purpose. If there had been a special verdict, unless it had been stated that all the directors, or that a board of directors saw and sanctioned the purchase of each article, it would not have been sufficient to fix the company, unless the reasoning of Mr. Justice Maule⁴ is correct, that if the directors carried on the business, and allowed persons to act for them on the premises in ordering and receiving goods, the company at large would be

¹ 2 Exch. 711, 718.

² 8 C. B. 668.

³ 11 C. B. 897.

⁴ 11 C. B. 928.

fixed, as an ordinary partnership would be under the same circumstances. No doubt this position is quite correct, if the directors are expressly or impliedly authorised by the deed (which depends upon the terms of it) to do so; but if it is beyond the powers of the directors, it is a different matter, and all persons dealing with the company ought to look at the deed and the Act of Parliament, otherwise the shareholders have not the protection which it was clearly intended to give them.

It is quite unnecessary to discuss this point now, because this is not a question about goods supplied, or services performed in the way of trade in the ordinary course, but a question as to a special contract to do the very unusual thing of purchasing by one company the trade of another. Such a contract clearly does not bind, unless it is authorised by the deed, and it is made strictly according to its provisions. Therefore it was required to be made by all the directors of the appellant company, or by a board where three being present the majority approves, and therefore binds the others. And when one of the persons selling is also one of * 422 the persons buying, as was * the case in this instance, Mr.

Collingridge being a director of the Port of London Company, and also of the Sea Fire Society, such director is by section 29 of the 7 & 8 Vict. c. 110, precluded from voting in the matter.

And, besides, the contract had no force whatever until approved by the majority of votes of the shareholders present at a meeting summoned for that purpose, according to the latter part of the 29th section; therefore, if there was no such meeting, the contract for this purchase, as well as the covenant to indemnify founded on it, was undoubtedly void.

There is no trace of any such meeting being held; and if it should be said, as it may, perhaps, justly be said, that the deed, being under the seal of the company and signed by two directors, must, *prima facie*, be taken to be valid, and it would therefore lie on the appellants to show by negative evidence that no such general meeting had taken place, such negative evidence is supplied by the testimony of Ashford, who was accountant of the Port of London Company, and of the Sea Fire Society, and who deposes that there was no board meeting nor general meeting, nothing of the kind, and that he never heard of any, and that Mr. Collingridge, the director in both companies, did every thing.

This objection, founded on the express provisions of the 29th

section of the 7 & 8 Vict. c. 110, does not appear to have been presented to the Lords Justices, and it is, I think, quite decisive of the question. The shareholders in the appellant company are clearly not bound by the covenant in the deed of conveyance of the 11th October, 1849.

It becomes, therefore, wholly unnecessary to consider the other objections to that deed. Whether it is void on the ground that it is sufficiently proved against the *prima facie* * case of * 423 the due execution of the deed in form, that there was no board of directors of the appellant company duly summoned, and so no power for two directors to enter into the deed ; or secondly, whether there was sufficient proof of the non-execution by the Port of London Company of the deed ; or thirdly, whether the want of a due conveyance of the good-will of the trade, which was the consideration of the covenant, would in equity have been a good defence, — all consideration of these matters is useless. Nor is it necessary to say any thing of the effect of the Sea Fire Society taking the business and accounts of the Port of London Company, and receiving the premiums due to that company. Whether the Port of London Company had any right against the Sea Fire Society to recover, back the sums received is another question. It is clear that this receipt does not make the society liable on the covenant to indemnify ; and it is more than questionable whether the society is liable for the receipts ; for the shareholders at large have this protection, that they can be liable only through the act of their directors acting under the authority of the deed and of the Act of Parliament.

It is a captivating argument for a jury, and jurymen are very often misled by it in these cases of joint stock companies, but it is very likely to produce injustice, that the company has had the benefit of the plaintiff's goods, or service or money, whereas for the purposes of contract, the company exists only in the directors and officers acting by and according to the deed ; and by the statute law the company is no more liable than a corporation by charter for the act of one or more of its members, who are distinct persons by law. Therefore I concur entirely with my noble and learned friend on the Woolsack, that the judgment of the Lords Justices ought to be reversed.

* *The Attorney-General*. — Your Lordships will not think * 424 this a case for costs ?

THE LORD CHANCELLOR. — The decree of the Lords Justices directs the costs of both parties to be paid out of the estate of the Sea Fire Assurance Society, but I do not think that is right; I think there ought to be no costs at all, but that each company ought to pay its own costs. I propose first to move your Lordships that the order of the Lords Justices be reversed; and that the cause should be remitted back to the Court of Chancery, with a declaration that the claim of the Port of London Company is not sustained; that the costs of each of these bodies ought to be borne out of its own estate; and that the costs which have been already paid should be refunded.

Order appealed against reversed. Cause remitted, with a declaration and directions.

Lords' Journals, 15th August, 1857.

*425 *SOUTHEASTERN RAILWAY COMPANY v. JORTIN.

1857. June 25, 26; July 7, 9, 10, 15.

The DIRECTORS, &c. of the SOUTHEASTERN RAIL-	} <i>Appellants.</i>
WAY COMPANY,	
ANN CATHARINE JORTIN,	<i>Respondent.</i>

Exchequer Loan Acts. Folkestone Harbour Acts. Priority. Consent. Mortgagees' Rights.

A public company was formed to erect certain works, and borrowed money for the purpose, giving mortgages to secure repayment, with interest. By several statutes the Exchequer Loan Commissioners are authorised to advance money to assist in completing public works, and to take mortgages on the works, and on the tolls, profits, &c. of such works, and priority is given to mortgages given to the commissioners over mortgages made to private individuals, except *bonâ fide* creditors who at the time of the advances by the commissioners are entitled to repayment. One of these statutes (57 Geo. 3, c. 34) provides, that where four fifths in value of the creditors shall agree in writing that a priority over their claims shall be given to the commissioners, such consent shall be binding on all the creditors. The creditors of this company entered into an agreement, by which they consented to give the commissioners' mortgage priority over their own securities "in manner following"; in the first place, that

the commissioners should, out of the annual rates, &c., be paid interest; in the next, that they should then be paid interest; and lastly, that the surplus should be applied in discharge of the principal sum advanced by the commissioners until that principal sum should be repaid, in preference to all other claims:—
Held, that an agreement giving this qualified priority to the commissioners was valid under the statute.

The 1 & 2 Wm. 4, c. 24, gave the commissioners, in case of default of payment, power to enter and sell. The 5 & 6 Vict. c. 9, enacted that the property sold by the commissioners should be held freed and discharged from all claim and demand of the mortgagors or of persons claiming under them, in all respects, as if they were foreclosed, “provided that nothing herein contained shall prejudice the rights” of any creditors “in respect of any surplus” arising on the sale:—

Held, that under these statutes the commissioners had a legal right to enter and sell; that after their claim for interest had been satisfied, the surplus was liable for the interest due to the other creditors; but that this liability could be enforced against the commissioners only, and not against the purchasers.

By the Act 47 Geo. 3, sess. 2, c. 2 (local), certain persons were authorised to “construct a pier or harbour at or near * the town of Folkestone, in the county of Kent.” They *426 were constituted a body corporate under the name of “The Folkestone Harbour Company,” and were authorised to borrow money necessary for the purposes of the Act to the amount of 8000*l.*, and “to demise, grant, bargain, and sell the property of the said harbour and capital stock therein, and the tolls, rents, and duties arising or to arise to the said company of proprietors by virtue of the said Act, as a security for any sum or sums of money which should be so borrowed, with interest.” The Act required an entry of a mortgage in the company’s books, and a memorandum of such entry to be indorsed on the mortgage: certain forms for that purpose were given in the Act.¹

The company borrowed 4500*l.* under this Act, and each lender received as security a deed under seal, by which, after reciting the Act, the Harbour Company mortgaged the harbour and buildings, and the rates, rents, and duties to become payable, until the sum borrowed, with interest for the same at the rate of 5*l.* per cent. per

¹ Under this Act a question arose as to the validity of a mortgage of which no entry in the company’s books, or any memorandum thereof, had been made, as required by the Act. Another question arose, whether the claim of this respondent was not barred by the Statute of Limitations. Both these questions were argued, but the course taken by the House in giving judgment renders it unnecessary further to notice them.

annum, should be paid. Mr. John Jortin became the transferee of several of these deeds to the amount of 1600*l.*, and on his death the respondent became entitled to them as his residuary legatee. Other Acts were afterwards passed, extending the powers of the Harbour Company, and authorising the raising of a further sum of money, not exceeding 20,000*l.*, on mortgage as before. Additional sums were borrowed.

By the 57 Geo. 3, c. 34, the Exchequer Loan Commissioners were authorised to grant loans for carrying on public
 * 427 * works on the security of (among other things) "the rates, tolls, and receipts accruing or to accrue from such works," and (section 22) a mortgage given under this statute was to have priority over all securities, except those of previous *bond fide* creditors entitled to repayment of their principal as well as interest.

It was expressly provided (section 23); that in every case in which four fifths in value of the creditors who had securities of a like nature upon the rates, tolls, or receipts arising out of the public work in respect of which application for a loan should be made, should agree and signify their consent in writing that a priority over their claims as such creditors should be given to the commissioners, then and in such case the security given to the commissioners should have priority over the claims of all the creditors of a like description, as well such as had assented to such priority as those who should so assent.

By another statute of the same year, 57 Geo. 3, c. 124 (which recited the previous Act), the commissioners were authorised (section 9) to take "mortgages, &c. upon the freehold, copyhold, or leasehold estate or estates of such principal or surety, or other person or persons by whom such loan shall be required."

The Folkestone Harbour Company obtained a loan of 10,000*l.* from the Exchequer Loan Commissioners, and for securing repayment of the same, executed an indenture, dated 15th April, 1818, between the company of one part and the secretary of the commissioners of the other part, which, after reciting the Harbour Acts and the Statutes of the 57 Geo. 3, stated the loan, and declared that in consideration of the same, the company, "in pursuance of the provisions of the Folkestone Harbour Acts, assigned all and singular the rates, duties, and receipts whatsoever, then or hereafter to become payable by virtue of the said Acts,

* and the right, title, and interest of the company in and * 428
to the same, and all freehold and leasehold messuages,
lands, tenements, and hereditaments belonging to the said com-
pany, according to the nature and quality of the same premises
respectively, but subject to the proviso for redemption thereafter
contained.

Before the loan was granted by the Exchequer Loan Commis-
sioners, there had been a meeting of the previous creditors and
mortgagees of the company, and a " memorandum," dated on the
same 15th April, 1818, was executed by them, which recited that
the commissioners had consented to advance the sum of " 10,000*l.*
in exchequer bills, to be applied in completing the said harbour,
and to be secured by a mortgage of the rates, duties, and receipts
now payable, or which may hereafter become payable, under and
by virtue of the said last-mentioned Acts"; and then proceeded
as follows: " Now these presents witness, that we whose names
are hereunto subscribed, being the present mortgagees or creditors
of the Folkestone Harbour Company who have respectively and
bonâ fide advanced money by way of loan to the Folkestone Har-
bour Company upon the several securities now held by us, &c.,
do hereby severally and respectively consent and agree, that any
mortgage or other security which shall be taken by the said com-
missioners, in the name of their secretary for the time being or
otherwise, of the rates, duties, and receipts of the said Harbour
Company, to secure the repayment of the loan of 10,000*l.* and
interest in the manner to be specified in such mortgage or mort-
gages, shall have priority over the respective securities now held
or hereafter to be held by us, or any or either of us, in manner
following (that is to say), that the said commissioners shall, in the
first place, be annually paid, out of the said rates, duties, and re-
ceipts, interest at the rate of 5*l.* per centum per annum on
the said * sum of 10,000*l.*, or upon such part thereof as * 429
shall from time to time remain due and unpaid; and in the
next place, that we whose names are hereunto subscribed shall be
annually paid, out of such rates, duties, and receipts, such interest
as may from the date of the said mortgage to the secretary of the
said commissioners become due to us respectively, by virtue of the
respective securities now held by us; and after such respective
payments of interest as aforesaid, the surplus of the said rates
duties, and receipts shall be applied in the discharge of the said

principal sum of 10,000*l.*, at such periods and in such proportions as shall be specified in the mortgage to the secretary of the said commissioners, until the whole of the said sum of 10,000*l.* shall be repaid, in preference to and with priority over all claims and demands whatsoever which we or any or either of us may have to the repayment of the several principal sums of money advanced by each of us respectively, any thing contained in the said last-mentioned Acts or Act, or in any mortgage, assignment, or other security now held by us, or any or either of us respectively, or to which we, or any or either of us, may be entitled upon such rates, duties, and receipts, to the contrary thereof notwithstanding."

By the 1 Geo. 4, c. 60, power was given to the Exchequer Loan Commissioners (section 19), in case "any default shall be made in the repayment (but not otherwise) of all or any part of a loan or advance which has been or shall be secured to the commissioners by any mortgage or assignment," to take possession of the mortgaged property, and by sale or mortgage thereof "to raise and levy such sum or sums of money as shall be sufficient to repay all monies due upon such loan, and the interest thereof, and all costs," &c. The 3 Geo. 4, c. 86, made other provisions of a like nature. By the 1 & 2 Wm. 4, c. 24, which recited all the previous statutes, other provisions were made, and it was * 430 * enacted (section 20), for remedy of doubts which had arisen as to the priority of the securities given to the commissioners, "that in all cases where such mortgages, assignments, or other securities shall have been or shall be taken by the commissioners under the recited Acts or this Act, all such mortgages, &c. have and shall have priority over all other liabilities, claims, and securities whatsoever chargeable on the property included in such securities, and all dividends and division of profit or interest, &c. on sums advanced, or which shall be advanced, for the carrying on, &c. any public work, &c. save only and except such sums as shall have been advanced by way of loan before the advance of such bills, and for securing of which said previous advances securities shall have been given to persons *bond fide* creditors, and entitled as such to the repayment of the principal money, as well as interest thereon."

The 21st section gave the commissioners power, in default of the "repayment of any loan, or of the interest thereof, or of any part

thereof," or if the borrowers should neglect or refuse to levy the rates, tolls, and receipts, "without prejudice, and in addition to every or any other remedy," to take possession of "the rates, tolls, and other receipts, the toll-bars, &c., and also the said interest, property, and effects, and all rents, issues, and profits thereof, and, in the absolute discretion of such commissioners, to continue in such possession, receipt, and enjoyment until the repayment of such loan, and the interest thereof, and of all costs, &c. or to relinquish the same in manner hereinafter mentioned"; and also to demise, &c. "and also to sell or mortgage all or any part of such rates, tolls, receipts, toll-gates, toll-bars, toll-houses, interests, property, effects, rents, issues, and profits," &c.

The interest on the exchequer loan of 10,000*l.* having fallen very greatly into arrear, the commissioners, by warrant

* dated 28th March, 1839, authorised their secretary to * 481 take possession, which was done.

The 5 & 6 Vict. c. 9, gave (section 19) power to the commissioners, on sale of any property under the previous statutes, to retain, after payment of costs, &c., "all the principal monies for the time being remaining due or owing, or secured by virtue of such mortgage, &c., notwithstanding the whole of such principal money, or any instalments thereof, may not, according to the terms of such mortgage, have become actually due and payable, together with all interest (if any) for the time being accrued due," &c. The 20th section enacted, that when the commissioners have sold, &c. "the same public works, interest, property or effects shall, in respect to, and to the extent of, the interest or estate so sold or otherwise disposed of, be held freed and discharged from all claim and demand of the persons, parties, bodies politic, corporate or collegiate, or companies, by whom the same were conveyed to the said commissioners or to their secretary, and of all persons or bodies claiming under them, and in all respects as if such persons, &c. making such conveyance or transfer, and all persons, &c. claiming under them, were in all respects, to such extent as afore-said, foreclosed from all equity or right of redemption of or in respect of the premises so sold or disposed of; provided that nothing herein contained shall be taken to prejudice the rights, &c. of any persons in respect of any surplus which may be produced, in consequence of" the commissioners entering into possession of or selling the mortgaged property.

In 1843 the interest on the Exchequer loan had fallen so much into arrear that it amounted to 8045*l.* 17*s.* 7*d.*, and the commissioners sold to Joseph Baxendale, William Parry Richards, and

Lewis Cubitt (who purchased as trustees for the South-
*432 eastern Railway Company) the tolls, *rates, receipts, freehold and leasehold hereditaments, &c. for the sum of 18,000*l.*, and by deed duly executed, and dated the 21st April, 1843, conveyed the property to them, and by another deed dated the 11th July, 1846, it was conveyed by them to the company.

In Hilary term, 1848, Ann Catherine Jortin filed her bill in chancery against the purchasers of the property sold by the commissioners, setting forth her title, and praying that it might be declared that she was entitled to a charge on the said Folkestone Harbour, and the buildings belonging thereto, for the sum of 1600*l.*, and interest due and to become due, and for general relief.

The appellants, by their answer, insisted that the Exchequer Loan Commissioners had, under their Acts, full power to sell and to convey to purchasers a title exonerated and discharged from encumbrances, &c. and had so conveyed to the appellants; that the remedy, if any, of Mrs. Jortin, was against the Exchequer Loan Commissioners, and that her claim was barred by the Statute of Limitations.

The cause was heard before Vice-Chancellor Stuart, who, on the 23d January, 1854, made¹ a decree, declaring the respondent entitled to the sums secured by the mortgages vested in her, and to the interest thereon, and that these, notwithstanding the sale by the Exchequer Loan Commissioners, were a charge upon the harbour, &c.; that the appellants were entitled to stand as transferees of the commissioners, and to the benefit of the memorandum of the 15th April, 1818, and under such memorandum (as regarded the rates, &c. payable under the Acts 47, &c. Geo. 3, but not

further or otherwise) were entitled to priority over the re-
*433 spondent for interest; that the rates, &c. as to * which the appellants had priority were from the time of purchase by them applicable, first, to pay the appellants the interest due on the 10,000*l.*; secondly, to pay the respondent the interest on the sums to which she was entitled; thirdly, to pay the principal of the 10,000*l.*; and fourthly, the principal due to the respondent; and accounts were ordered accordingly.

¹ 2 Smale & G. 48.

The appellants carried the case before the Lords Justices, who on the 18th January, 1855,¹ affirmed the same. The present appeal was then brought.

The Attorney-General (Sir R. Bethell) and Mr. L. Wigram (Mr. Pole was with them) for the appellants. — The question here depends on the power of the commissioners to sell the property and to give a good title. It cannot be denied that the agreement itself gave the commissioners an absolute priority, as to interest, over interest due to the private mortgagees. So far, therefore, the sale was in accordance with the express agreement of these persons. But the Exchequer Loan Statutes recognize no restriction whatever, but speak of “a priority over the claims of all the creditors of a like description.” The agreement must be taken to have been made in accordance with these provisions; and therefore the observation of Lord Justice Turner, that the commissioners have “no power to sell so as in any manner to affect priorities which have not been conceded to them,” becomes entirely inapplicable, for the statutes give the power to sell the property in its entirety whenever the interest falls into arrear. Here it was largely in arrear, and the power attached, and the sale being fully authorised, the purchasers received the property discharged from all previous encumbrances. The question of priorities then becomes transferred to the proceeds of the * sale, and affects * 434 those who have received these proceeds. The 5 Vict. c. 9, makes the sale binding, and declares that the purchaser shall hold the property freed and discharged from all claims of the mortgagors and of those who claim under them. The appellants are therefore freed from all liability to answer; and proceedings, if taken at all, ought to have been taken against the commissioners, and not against these appellants. The respondent having filed her bill against the wrong parties, they are entitled to have it dismissed with costs.

Mr. Roundell Palmer and Mr. Baily for the respondent. — The commissioners might no doubt have refused to make any advance unless they obtained an absolute priority in all respects over all the previous mortgagees. But they did not adopt that course. They accepted the consent of the previous mortgagees to a qualified

¹ 6 De G., M. & G. 270.

It is hardly necessary to add, that this decision in no way affects the rights of the respondent on the money produced by the sale. The commissioners, unless there have been some special circumstances affecting the case, are bound, not only on general principles of equity, but also by the express provision of the clause in the last Act to which I have referred, to pay over and distribute any surplus money in their hands, after satisfying their arrears of interest, to and among the persons justly entitled to it. With that question, however, the present appellants have no concern. They are purchasers under a power of sale, the exercise of which gave them a good title against the harbour trustees, and all deriving title under them.

I shall, therefore, move your Lordships to reverse the decree below, and to remit the cause, with a declaration that the respondent's bill ought to have been dismissed, and I think it ought to have been dismissed with costs.

LORD WENSLEYDALE. — My Lords, three questions arise in this case, which have been fully discussed at your Lordships' bar. The first and the most important was, whether the sale by the Exchequer Bill Commissioners to the trustees for the London and Southeastern Railway Company was valid so as to give them a good title, free from the respondent's prior mortgage, or was subject to that encumbrance; and, if subject to it, there arose two more questions. The first, whether the respondent could make a good title to the mortgage bonds claimed by her for want of the entry in the books of the company, and the indorsement on the bonds and transfer of the bonds required by the 47 Geo. 3, c. 2,

§ 25. The second, whether the claim on these bonds was * 438 barred * by the Statute of Limitations.¹ After full consideration of the subject, I am of opinion that the sale by the commissioners in April, 1843, conveyed a good and valid title to the purchasers. It is, therefore, unnecessary to give any opinion on the two other objections.

This question depends entirely upon the construction of the statutes relating to the power of the Exchequer Bill Commissioners under several different statutes. The power to lend money on mortgage is given to the Exchequer Bill Commissioners by the 57 Geo. 3, c. 34, § 22, and such mortgages are to have priority over

¹ See ante, p. 426, n.

all monies subsequently advanced, save and except such sums as shall have been advanced by way of loan by *bond fide* creditors, and entitled as such to repayment of the principal money advanced by them, as well as interest thereon. In default of the repayment of the loan to the commissioners, in part or in whole, the 1 Geo. 4, c. 60, § 19, authorises them to take possession of all or any part of the property or effects, real or personal, assigned to the commissioners, and by sale or mortgage to raise and levy sufficient to repay all monies due on or in respect of the loan, interest, and costs and charges to be paid in satisfaction of the loan; and the receipts of the commissioners are to be discharges to the purchasers or mortgagees, who are not bound to see to the application thereof. This statute gives the power of entering and taking possession only where the principal, or part of it, is unpaid. The 1 & 2 Wm. 4, c. 24, § 21, extends this power to cases where the interest alone is in arrear, and the mortgagees have the power to sell or mortgage the rates, tolls, receipts, toll-bars, and all the property, effects, rents, issues, and profits, and to raise the arrears by sale or mortgage.

It seems to me quite clear that these powers of taking *possession, and subsequent sale or mortgage, are only *439 given where the commissioners have a legal right to enter.

If there is a prior mortgage to others, so that the commissioners have only a mortgage of the equity of redemption, they have no power to take possession, and therefore no power of sale. The prior section (the 20th) explains this, and gives the commissioners priority save and except where sums have been advanced by way of loan before the advance of the commissioners. The 5 Vict. sess. 2, c. 9, § 20, made for the application of the money raised, and providing for the rights of different claimants, no doubt applies to those cases only where the commissioners have a right to take possession, that is, where they are the first encumbrancers.

If the commissioners are the first encumbrancers, then no doubt the appellants have a good title by virtue of the sale to them, and the remedy of the respondent is against the Commissioners to receive her debt and interest out of the surplus of the produce of the sale, after making the several deductions provided for by the above-mentioned section. This section provides expressly that nothing shall prejudice the rights of any persons or parties, as

against the commissioners or their secretary, in respect of the surplus of the money which the commissioners may receive.

That brings us to the question, whether the commissioners are to be considered as the first encumbrancers, and this appears to me to be the only question of any nicety or doubt in this part of the case.

Their title to be first encumbrancers depends upon the construction of the 23d section of the 57 Geo. 3, c. 34. [See ante, p. 427.] The mortgage to the commissioners, made on the 15th April, 1818, provided that the interest of the 10,000*l.* advanced by the commissioners, viz. 5*l.* per cent. per annum, was to * 440 be paid for three years, on the 15th of April * of every year, and after that time such interest, and 600*l.* of the principal also, till the whole of the 10,000*l.* and interest should be paid off. Contemporaneous with this mortgage, on the same 15th of April, 1818, an agreement in writing was made by four fifths in amount of the creditors of the Harbour Company, reciting that the Company had consented to advance 10,000*l.* to be employed in completing the harbour, and to be secured by mortgage of the rates, and consenting and agreeing that such mortgage, securing the repayment of the 10,000*l.* and interest as specified in it, should have priority over the securities held by them, in this manner, — that the commissioners should, in the first place, be annually paid 5 per cent. per annum on the 10,000*l.* ; then that the other creditors should be afterwards paid interest on their securities ; and afterwards that the surplus of the rates should be employed in the discharge of the 10,000*l.* due to the commissioners, as should be specified in their mortgage, until the whole 10,000*l.* should be repaid, in priority over all their demands for repayment, any thing contained in any of their mortgages notwithstanding.

The question then is, whether this qualified priority given by the agreement to the commissioners, the interest payable to them taking precedence of the interest due to the creditors, and the principal payable to them also taking precedence of the principal due to the creditors, is valid by the 23d section, to make the commissioners first encumbrancers as to the interest, or does the statute require a written consent of four fifths of the other creditors to an absolute unqualified priority as to the whole of their debts, both principal and interest ?

I think there is nothing in the statute which invalidates the

agreement made by the commissioners and the creditors. It is certain that both of them intended to * comply with * 441 the provisions of that section, and that the agreements were drawn up advisedly with a view to its enactments, and according to their understanding of its meaning, and I do not think that they have been mistaken. The section does not in express terms require an absolute priority for the whole debt, principal and interest. It stipulates that in every case where an application is made for advances, if four fifths of the creditors shall signify their consent in writing to a priority over the claims, then the commissioners shall have priority against all, as well against those who have not assented to such priority as against those who have.

Is there any thing in the nature of the case which calls upon us to put such a construction on this clause as to require a consent to postpone their debts, and every part of them, and the interest on them, to the debt of the commissioners? I think the contrary may clearly be inferred. It is obvious that the intent of the Legislature was to facilitate the advance of exchequer bills on public works generally, and particularly on those which were already encumbered, which could not be completed, and thereby rendered productive to any one, without such advances. But further advances would not be made by the commissioners unless they had the security which the power of entry, sale, and mortgage would give. Had the consent of every prior mortgagee been necessary, there would have been great difficulty in accomplishing the object. Those last called upon would very likely have refused, from the conviction that they would obtain by such refusal the payment of their debts. Therefore the Legislature, in order to accomplish the desirable object of obtaining an advance from the commissioners, gives four fifths of the body of creditors the power of binding the whole; certainly a strong * measure, * 442 and demonstrating the intention that such advances were to be highly favoured.

Then what ground can there be for supposing that such a reasonable course as the parties chose to pursue in this case would not be permitted by the statute, namely, an agreement to give the commissioners a priority of interest over interest, and principal over principal, due to the other creditors? If the section is to be construed as requiring an entire priority of the debt of the commissioners and the interest due to them over the principal and the

interest due to all the other creditors, it would tend to prevent, not to facilitate, the advance of money by the commissioners, as the other creditors would be less likely to consent to give an entire than a partial priority to them.

I have come to the conclusion, therefore, that the agreement which all the parties entered into with a view to comply with the statute was a valid and binding one, and consequently, that the commissioners acquired the first security.

It follows that they had a title to enter into, and take possession and sell, that the sale that they made gave a good title to the appellants, and that the remedy of the respondent and all the other bondholders is not against the appellants, but against the commissioners, if there is any surplus applicable to the payment of the interest due to them.

It becomes unnecessary, therefore, to consider the other points argued before us. I entirely agree with my noble and learned friend that these decrees must be reversed.¹

*443 . *Decree reversed. Cause remitted with declaration and directions.*

Lords' Journals, 15th August, 1857.

HOOPER v. LANE.

1856. June 24, 26. 1857. July 2; August 28.

J. K. HOOPER and J. PILCHER, *Plaintiffs in error.*

J. LANE, JANE SIGEL, and C. E. NEWCOMBE, *Defendants in error.*

Sheriff. Arrest. Writ valid and invalid. Detainer. Entry of Judgment. Interest.

Although the sheriff is an agent for those who put writs into his hands to execute, he is also a public functionary, having, at the same time, duties to perform towards those against whom such writs are directed.

¹ His Lordship afterwards favored the reporter with a note to say, that in delivering his own opinion he had accidentally omitted to state that Lord Brougham, who had heard the case argued, entirely concurred with the judgment now delivered.

If the sheriff having two writs in his hands, one valid, the other invalid, arrests on both at the same time, he may rely on the valid writ, and treat as detainees any number of valid writs which he may then have, or which may afterwards come to his hands.

But if, having two such writs, he arrests on the invalid writ alone, he cannot afterwards justify the arrest by the good writ.

Nor can he while a person is unlawfully in his custody, by virtue of an arrest on an invalid writ, arrest that person on a good writ. To permit him to do so would be to allow him to take advantage of his own wrong.

H., a sheriff, had in his office a valid writ against B., at the suit of one L., but had not himself granted any warrant upon it. H. had also in his hands a writ against B., at the suit of A., which was invalid for want of signature by the proper officer of the Exchequer, the Court out of which it issued. H. had granted a warrant on this writ, and H.'s bailiff arrested B. upon it. B. went before a Judge, claiming to be discharged. The bailiff opposed this application, and, having then obtained a warrant on L.'s writ, also claimed to detain B. on that writ. The Judge discharged B., who then left the country. In an action by L. against H. for neglect, the Judge told the jury that it was a question of fact whether H. had been guilty of culpable neglect in arresting upon A.'s invalid writ; and that if H. knew, or by reasonable care might have discovered, that A.'s writ was void, it was culpable negligence:

Held, affirming the judgment of the Court below, that this direction was right.

A declaration contained two breaches. The defendant pleaded not guilty on the first breach, which involved the whole cause of action. The finding was for the plaintiff, and the damages were *assessed thereon, and judgment was entered up on that finding. On the second breach there was a finding of not guilty. No entry of *eat sine die* was made on this finding:

Held, that there should have been such an entry; but that this House had power to amend the record, by directing such an entry to be made?

Quære. Whether where a judgment of the Court below is affirmed on error, and interest is asked for under the 3 & 4 Wm. 4, c. 42, this House need make the order for interest, or may leave the party to apply for it in the Court below?

CASE against the defendants below, as sheriff of Middlesex, for breach of duty, in not arresting one Anthony Bacon, against whom the plaintiffs below had lodged a *capias ad satisfaciendum*.

The declaration, after alleging that the defendants were sheriff of Middlesex, that the writ of the plaintiffs was delivered to them, that Bacon for a certain time afterwards was within their bailiwick, and that they at any time during that period might have arrested him under it if they would so have done, stated as a first breach, that the defendants, not regarding, &c. did not nor would at any, &c. although often requested so to do, and although a reasonable time had elapsed for them so to do, take Bacon under the writ, but made default; and, as a second breach, that the defendants

afterwards wrongfully and illegally took Bacon under the false and illegal pretence of another writ, whereas there never was any such writ, and wrongfully detained him until he was discharged by an order of Mr. Justice Coltman, whereby, whilst they so wrongfully imprisoned him, and for a reasonable time after his discharge they could not arrest or detain him under the plaintiffs' writ, but were obliged to permit him to depart from their custody, and he left their bailiwick.

The defendants pleaded, first, not guilty as to the whole declaration; secondly, that Bacon was not within their *445 bailiwick as alleged; thirdly, that they could not * have arrested him as alleged; fourthly, as to so much of the declaration as related to the first breach, that they were not, at the time of the delivery of the writ, sheriff of Middlesex; fifthly, as to the same breach, that the writ was not delivered to them in manner and form, &c.; sixthly, as to the second breach, the defendants said, first, that they were not, during the time alleged, sheriff, &c.; seventhly, as to the said second breach, that they did not take Bacon under a false and illegal pretence of a writ; and, eighthly, that there was a writ of *capias*, at the suit of one Arambura, under which the defendants took Bacon, specially traversing the plaintiffs' allegation that there never was any such writ. The plaintiffs took issue on all these pleas. There were two other pleas, which were demurred to, on which judgment was given for the plaintiffs.

The cause was first tried before Lord Denman on May 12, 1845, when a verdict was found for the plaintiffs below on all the issues of fact.

The facts proved in evidence were, that the plaintiffs below delivered their writ of *ca. sa.* for 32*l.* 3*s.* 4*d.* debt, and 3*l.* 10*s.* damages and costs, against Anthony Bacon, to the then sheriff of Middlesex on May 20, 1842, and this was delivered over, by their predecessors, to the defendants below on their coming into office at the end of that year. That a warrant was issued by their predecessors on this writ, but no new warrant was granted by the defendants until after Bacon was in custody as hereinafter mentioned. That on August 1, 1843, a piece of parchment purporting to be a *capias ad respondendum* against Bacon at the suit of one Juan Arambura out of the Court of Exchequer of Pleas (which was a nullity) was delivered to the defendants, and infor-

mation was given to them as to where he was to be found. They thereupon issued their warrant on that piece of parchment to their * officer, Swayne, who immediately arrested him.¹ *446 A summons was taken out by Bacon for his discharge from this arrest, on the ground that the writ was a nullity. The defendants did not attend the summons, and Bacon was directed by Mr. Justice Coltman to be discharged; a warrant having in the interval been made out by the defendants, under the plaintiffs' writ, the sheriff claimed a right to detain Bacon under the warrant. Another summons was taken out by Bacon for his discharge in the plaintiffs' suit. No notice was given to them of this summons; and on an objection being raised by the defendants, who did attend it, that the plaintiffs ought to have been summoned, Mr. Justice Coltman said there was no necessity for this, as it was the wrongful act of the sheriff which was complained of, and ordered his discharge. Evidence was given that Bacon could and would have paid the plaintiffs, had he been arrested under their writ. Immediately after this his second discharge, he left this country.

Lord Denman directed the jury that under these circumstances there had been no valid arrest of Bacon at the suit of the plaintiffs below; that the order of Mr. Justice Coltman was no justification to the sheriff, and that if the jurors believed the above facts, the defendants were liable for negligence, and had been guilty of negligence in point of law, and that the only question was the amount of * damages, if, in point of fact, the defend- *447 ants had been guilty of negligence. To all these directions the defendants tendered a bill of exceptions, which came on for argument before the Court of Exchequer Chamber; and on May 13, 1848, judgment was given,² by which it was ordered that the verdict should be set aside and a *venire de novo* awarded, on the ground that on the issue of not guilty as applied to the second breach, the Judge ought to have left to the jury the ques-

¹ This writ was proved to be void and a nullity, for want of being properly issued. The practice of the Court of Exchequer was this: Writs of *capias* are first sealed by the Chancellor of the Exchequer, and then brought to the office of the Court of Exchequer to be signed. The signing is done by stamping, without which there is no authority to arrest. When so signed a *præcipe* is filed in the office of the Court, accompanied by an order of a Judge to hold the defendant to bail. The stamp of the Court is then put on. There was no stamped signing, nor any *præcipe*, nor any Judge's order, in *Arambura's case*.

² 10 Q. B. 546.

tion of negligence whether the defendants below knew or ought, if they had used reasonable care, to have known of the defect in Arambura's writ. As to the rest the direction was held to be correct. The Court also suggested the expediency of assessing the damages on the two breaches separately, expressing some doubt as to the sufficiency of the mode in which the second breach was framed.

The cause came on for trial again on the 25th May, 1850, before Lord Denman, when the same evidence was given; and the learned Judge, in summing up, directed the jury in precise accordance with the mode pointed out as proper in the Exchequer Chamber. The defendants thereupon again tendered a bill of exceptions.

The jury found a verdict for the plaintiffs below on all the issues in fact, save the general issue, and as to that issue found a verdict for the plaintiffs below as to the first breach, with damages 32*l.* 3*s.* 4*d.*; and in order to obviate any question as to the sufficiency of the second breach in accordance with the suggestion made in the judgment of the Court of Exchequer, as to that breach they found that the defendants were not guilty.

After argument on this second bill of exceptions, the
*448 Judges unanimously affirmed the judgment of the Court *below.¹ The judgment was then entered generally for the plaintiffs, but there was no entry of *eat sine die* in respect of the finding for the defendants on the second breach. The defendants below (the plaintiffs in error) then suggested error, pursuant to the Common Law Procedure Act, 1852, and so brought the case up to this House.

Mr. H. Hill and *Mr. Quain* for the plaintiffs in error. — The general principle will not be disputed, that if a sheriff holds several writs against one individual an arrest upon one is an arrest upon all; and to that may be added the rule laid down in *Semayne's Case*,² that though the sheriff may be guilty of an illegality in effecting the execution of process, and may so render himself liable in damages, the rights of the plaintiff will not be thereby affected. That doctrine was acted on in *Taylor v. Cole*,³ and no distinction exists in this respect between the power of a sheriff act-

¹ The case was not reported on the second argument.

² 5 Rep. 91, 93 a.

³ 3 T. R. 292.

ing on a *ca. sa.* and on a *fi. fa.*, as is shown in Smith's Leading Cases,¹ where this subject is fully discussed. It follows, therefore, that there was here a valid detainer upon Lane's writ. The case of *Barratt v. Price*,² in which it was held that a sheriff who has illegally arrested a plaintiff in one action cannot detain him in another, cannot be supported: *Pearson v. Yewens*,³ *Robinson v. Yewens*,⁴ and *Collins v. Yewens*,⁵ though they appear to follow it, are in fact distinguishable from it, for they all assume that though the first arrest is bad the others may be good, provided there has been no collusion; here there was no collusion on the part of Lane or of the sheriff; there was, therefore, a valid arrest under Lane's writ. Where the plaintiff * himself has been guilty * 449 of some irregularity; as, if he improperly issued the writ, *Hall v. Hawkins*,⁶ *Wells v. Gurney*;⁷ or failed duly to revive a judgment, *Barrack v. Newton*;⁸ or arrested a man without any writ, *Barlow v. Hall*;⁹ or arrested one who was privileged, *Spence v. Stuart*;¹⁰ or did not make a proper affidavit of debt, *Barclay v. Faber*;¹¹ such a discharge would operate against him, for he cannot take advantage of his own wrong. But *Howson v. Walker* and *Crowden v. Walker*,¹² show that where the plaintiff is not himself guilty of any wrong, and does not collude with any one who is, the arrest as to him shall be valid. Indeed, in such a case the sheriff would be liable if he did not act upon the valid warrant placed in his hands, for the execution is completed by the delivery to him of the *ca. sa.*: *Owen v. Owen*.¹³ *Arundel v. Chitty*¹⁴ decided that where a defendant was illegally arrested while a valid *ca. sa.* at the suit of the plaintiff was lying in the hands of the sheriff, the *ca. sa.* attached, and the sheriff could not discharge the defendant. The sheriff here was, therefore, entitled to detain Bacon on Lane's writ at the moment when he was discharged from Arambura's writ, and that right operated as a new arrest. The principle in all these cases was, that the plaintiff not being a party to the original illegal arrest, the writ issued by him had its full effect. An arrest on one

¹ Vol. 1, p. 95 - 110, note on *Taylor v. Cole*.

² 9 Bing. 566.

³ 5 Bing. N. C. 489.

⁴ 5 M. & W. 149.

⁵ 10 A. & E. 570.

⁶ 4 M. & W. 590.

⁷ 8 B. & C. 769.

⁸ 1 Q. B. 525, s. c. nom. *Reynolds v. Newton*, 1 Gale & D. 153.

⁹ 2 Anstr. 461.

¹⁰ 3 East, 89.

¹¹ 2 B. & Ald. 743.

¹² 2 W. Bl. 823.

¹³ 2 B. & Ad. 805.

¹⁴ 1 Dowl. P. C. 499.

writ is an arrest on all, as an escape in one would be an escape in all: *Benton v. Sutton*,¹ *Watson v. Carroll*.² That principle
 * 450 ought * to have been applied here, for here the plaintiff Lane was not guilty of any fault whatever, and the arrest on his writ was therefore valid. The whole question was considered in *Eggington's Case*,³ where a conviction on an information for not delivering up books to a town council was held to be substantively a civil proceeding, and an arrest upon it made on a Sunday illegal; but before the order to discharge was executed the sheriff lodged with the jailer a *ca. sa.*, and it was held that that was a valid detainer, there being no collusion between the plaintiff in the suit and the persons who had made the first arrest.

In *Barratt v. Price* the conduct of the sheriff's officer who had acted irregularly was treated as the conduct of the sheriff, and it was on that ground that the decision proceeded; but *Robinson v. Yewens*⁴ assumed exactly the opposite state of things, and there the defendant was kept in custody. In fact, therefore, those two cases are in conflict; but in all the cases arising out of proceedings against this defendant Yewens, whether the Court discharged the man or not, the third and innocent party was treated as unaffected by the error. *Thurland's Case*⁵ was an instance of that kind. The arrest was improperly made, but the plaintiff being unconnected with the impropriety the defendant was committed on his execution. That is a very strong case; for all the officers, and even an agent of the plaintiff, were there punished for their misconduct.

If the case is put on any alleged misconduct of the sheriff, what is the misconduct which is to affect the arrest? It must be something of which the person making the arrest is wilfully
 * 451 guilty, as in the *Countess of Rutland's Case*,⁶ and *Birch v. Prodger*,⁷ in both of which the plaintiff and the officers were alike guilty of the misconduct. There is nothing of that sort here, and neither of those cases in the least degree applies to the present. The only impropriety here was that of the officer of the Court, who had not properly stamped Arambura's writ. A different principle must apply to cases where the irregularity is, as it is

¹ 1 B. & P. 24.² 4 M. & W. 592.³ 2 Ellis & B. 717.⁴ 5 M. & W. 149.⁵ 2 Dyer, 344 b.⁶ 6 Rep. 52 b - 54 a.⁷ 1 New R. 135.

here, in the writ itself, from that which is applicable to those where the irregularity is in the mode of execution; as, for example, arresting a person while he is privileged from arrest, *Spence v. Stuart*; ¹ when, as one arrest enures for all writs then in the sheriff's hands, it may be said that such an irregularity vitiates all; but here the irregularity was in the form of one particular writ alone, and that irregularity cannot be held to taint all the others which were perfectly regular. *Dr. Groenvelt's Case*, ² cited in *Lucas v. Nockells*, ³ shows, that if the sheriff has two writs in his hands, one regular and the other irregular, and makes the arrest under the latter, he may, nevertheless, justify under the former; and in the same case, ⁴ it is said: "Suppose one has a legal and an illegal warrant, and arrests by virtue of the illegal warrant, yet he may justify by virtue of the legal one, for it is not what he declares, but the authority which he has." Then as to the absence of a warrant on Lane's writ at the moment of the arrest under Arambura's writ, the arrest here was made, not by a stranger, or by a person authorised only in Arambura's case, but by the bound bailiff of the sheriff, and the possession * of a war- * 452 rant by him in the particular case was unnecessary. His general authority made the arrest by him legal without a warrant, *Dalton*; ⁵ who says a bound bailiff need not show a warrant, but another man who is not a sworn officer must. And in *Hodges v. Marks*, ⁶ where the persons making the arrest were not known bailiffs, it was held, that they were not bound to show their warrant till the person arrested "obeyed and demanded it."

The entry of judgment is erroneous. The findings on not guilty and on the issue on the seventh plea are inconsistent. As to the first breach, it is found that the defendants did not, nor could arrest Bacon on the plaintiff's writ; and as to the second, that the defendants did not wrongfully arrest Bacon on Arambura's writ; while, upon the seventh issue it is found, that the defendants did arrest Bacon under the false and illegal pretence of Arambura's writ. No judgment can be entered on these findings.

Again: there being a finding of not guilty on the second breach, there ought to have been a judgment of *eat sine die* on that find-

¹ 3 East, 89.

² 1 Clark & F. 438, 463, 493.

³ 12 Mod. 386, 1 Ld. Raym. 454.

⁴ 12 Mod. 387.

⁵ *Sheriffs*, c. 21, p. 103, c. 32, p. 156, citing the Year Books.

⁶ Cro. Jac. 485.

ing, *Gregory v. The Duke of Brunswick*,¹ *Wood v. Suckling*.² If a Court of error cannot, as it is submitted it cannot here, give such a judgment as the Court below ought to have given, *Pollitt v. Forrest*,³ *Friar v. Grey*; ⁴ a *venire de novo* must be awarded, Comyn's Digest; ⁵ though that will be unnecessary if it should be decided that in this case there was a valid arrest of Bacon at the suit of Lane, for that will dispose of the whole case in favour of the plaintiffs in error.

* 458 * *Mr. Watson* and *Mr. Dowdeswell* for the defendants in

error. — The facts of this case remove all doubt as to the law; Bacon was arrested under a warrant, on a writ which was in law no writ at all. There were other writs in the office, but no warrant was granted on any of them, nor was there even a verbal authority given to the officer to arrest upon them. The rule of law, that when there has been one valid arrest by the sheriff, the defendant is in custody on all the other writs in the office issued against him, is admitted, but then the first must be a legal arrest: *Frost's Case*.⁶ If illegal, the other writs do not operate as detainers: here it was illegal. This case therefore falls within *Barratt v. Price*, which is well decided, and is warranted by the previous authorities. *Ex parte Ross*⁷ shows, that where the arrest is illegal all the detainers are inoperative; nor does it make any difference that the writs on which such detainers have taken place were all lodged previous to the arrest. *Ex parte Hawkins*⁸ and *Barlow v. Hall*⁹ are to the same effect.

There is no rule that the defendant is only entitled to be discharged where the plaintiff has been a party to the irregularity in the arrest. The rule is, that where the arrest has been so made as to constitute an act of trespass, it is altogether, and for all purposes, illegal: *Loveridge v. Plaistow*,¹⁰ *Birch v. Prodger*,¹¹ *Attorney-General v. Dorkings*,¹² *Attorney-General v. Carl Cass*.¹³ All these cases show that where the arrest by the sheriff in one case is illegal, the other writs in his hands do not operate as detainers.

¹ 3 C. B. 481, 2 H. L. Cas. 415.

² Cro. Jac. 439.

³ 11 Q. B. 949, 962.

⁴ 15 Q. B. 891, 901.

⁵ Pleader, § 23.

⁶ 5 Rep. 89.

⁷ 1 Rose, 260.

⁸ 4 Ves. 691.

⁹ 2 Anstr. 461.

¹⁰ 2 H. Bl. 29.

¹¹ 1 New R. 135.

¹² 11 Price, 156.

¹³ 11 Price, 345.

The writs themselves are, however, unaffected, and may be * afterwards executed. That is the doctrine in *Barratt v. Price*, which has been followed in substance by all those cases in which Yewens was a defendant; and the difference in the result of one of those cases is attributable, not to any doubt as to the rule, but to the particular circumstances of that case.

An officer, to make a valid arrest, must have a warrant at the time. Here the officer had no warrant on Lane's writ when he arrested Bacon on Arambura's writ. The party is at all times entitled to see the warrant. *Barrack v. Newton*¹ shows that the justification for the sheriff is the writ, and for the officer the warrant. *Hall v. Hawkins*,² *Wells v. Gurney*,³ are cases where there was no illegal act by the sheriff; but the defendant was discharged from custody because the arrest was irregular. Where there is a mere irregularity in the process, and the process is afterwards set aside, it may not affect the interests of other parties, because the arrest was at the time good; but where the irregularity is in the act of the sheriff, he cannot treat his illegal arrest of a party as a valid detainer of that party under other writs then in his possession. The foundation being gone, all the rest goes with it. The rule in *Barratt v. Price*⁴ must govern the present case.

*Eggington's Case*⁵ does not apply here, for there the man was not in the custody of the sheriff, but the sheriff, hearing of his being in custody on other process, made the arrest. *Thurland's Case*⁶ cannot be supported; all the modern authorities are against it; and *Semayne's Case*⁷ does not strengthen the argument on the other side, for the general proposition there stated applies only to a case where * the original arrest is regular. That * 455 is the rule given in *Frost's Case*.⁸

What took place at chambers before Mr. Justice Coltman was no arrest, but was a mere claim to detain on an arrest already made, which arrest was irregular. It cannot benefit the sheriff.

As to the form of the record. There were here several breaches; on only a part of one of them was there a finding for the defendants below; and it is contended that there ought to

¹ 1 Q. B. 525, s. c. nom. *Reynolds v. Newton*, 1 Gale & D. 153.

² 4 M. & W. 590.

³ 2 Dyer, 244.

⁴ 8 B. & C. 769.

⁵ 5 Rep. 91 - 93 a.

⁶ 9 Bing. 566.

⁷ 5 Rep. 89.

⁸ 2 Ellis & B. 717.

have been an entry of *eat sine die* on that finding. It is not necessary to make any entry which will only affect the costs ; they will be deducted as of course, and the Master's *allocatur* will show what is due. It is not proper to enter an *eat sine die* where the defendant is liable for any costs (Chitty's Forms) ; it is quite unnecessary now, because all days of continuances are abolished. By the Common Law Procedure Act of 1852, sections 155 and 157, the Court of Error may correct any thing amiss in the proceedings of the Courts below, and "give such judgment as they shall be advised thereon," or "as the Court from which error is brought ought to have done." If, therefore, there has been any mistake in form, it may be remedied here. But if it should be said that error here is not brought under that Act, then there is no valid proceeding in error here, and Lane must have judgment, for the whole form is according to that statute.

There is no inconsistency in the findings, or if there is, the record may be amended by the Court of Error, and the proper judgment may be entered.

Mr. Hill, in reply.—The cases of *Ex parte Ross*¹ and *Ex parte Hawkins*² are both cases of privilege of a bankrupt, * 456 * and have no bearing on the present case. In *Barlow v.*

Hall,³ the plaintiff was himself guilty of the wrongful arrest ; and so he was in *Loveridge v. Plaistow*,⁴ where the arrest was on a Sunday ; and in *The Attorney-General v. Dorkings*,⁵ and *The Attorney-General v. Carl Cass*,⁶ it was merely held that a wrong arrest could not be rendered legal by something subsequent ; but none of these cases supports the doctrine in *Barratt v. Price*, which was properly described by Mr. Baron Parke, in *Robinson v. Yewens*, as introducing a new rule of law. To entitle the defendant to a discharge as to all the writs, the illegality must pervade all and affect each. That cannot be the case where the irregularity is in the process in one action alone.

The entry of *eat sine die* is necessary, because as to a substantive part of the cause of action the defendants were acquitted, and so they ought to have the means of availing themselves of it in any other action.

¹ 1 Rose, 260.

² 4 Ves. 691.

³ 2 Anstr. 461.

⁴ 2 H. Bl. 29.

⁵ 11 Price, 156.

⁶ 11 Price, 345.

As to the inconsistency, there were two breaches and two different findings as to the same thing. That is repugnant, and no judgment can properly be given on the record as it stands, nor can it be amended here, but a *venire de novo* must be awarded.

THE LORD CHANCELLOR moved that the following questions should be put to the Judges : —

“ Whether, attending to the pleadings in this case, and the evidence appearing on the bill of exceptions,

“ 1. When the officer of the plaintiffs in error took Anthony Bacon into custody, at the suit of Arambura, he was in their lawful custody under the valid writ of *ca. sa.* which was in their hands at the suit of the defendants in error ?

* “ 2. If Bacon was not then in their lawful custody, *457 whether, when the plaintiffs in error afterwards brought him in custody before Mr. Justice Coltman, he was then in their lawful custody at the suit of the defendants in error ?

“ 3. Whether there was any evidence for the jury that the plaintiffs in error were guilty of a breach of duty towards the defendants in error in arresting Bacon under Arambura’s writ ?

“ 4. Whether there is error in the judgment by reason of there being no entry discharging the plaintiffs in error without day, as to so much of the breach on the plea of not guilty as was found for the plaintiffs in error ?

“ 5. Whether there is such inconsistency in the findings of the jury, on the plea of not guilty and on the seventh plea, as makes a *venire de novo* necessary ? ”

The Judges requested time to consider these questions.

1857. July 2.

MR. BARON BRAMWELL. — My Lords, in this case the finding of the jury as to the second breach lays that out of the question, and I think that the second, third, fourth, and fifth pleas were properly found for the plaintiff below ; for though I think the defendants might reasonably have contended that the third plea should have been found for them, yet I do not read the exception as taking that objection. It seems to me that as a sheriff is not liable to an action for not arresting unless he improperly omits to look for the debtor, or to arrest him when he knows where he is ; and as “ not guilty ” only puts in issue the not arresting, and the power to do

so is part of the inducement which is traversed by the third plea, the defendants might have contended that having no notice that Bacon was the person in Lane's writ, they had no notice that that Bacon was in their bailiwick, and so could not arrest; but this objection seems to me not taken, and if so, all that *458 *remains to be considered is, the direction as to the first plea to the first breach, and that direction is, "that there had been no arrest by the sheriff at the suit of Lane." The residue of the direction is, I think, only applicable to the second breach. It is important to fix precisely the meaning of the first breach. It cannot be read as merely charging that the sheriff did not originally arrest in Lane's action; otherwise it is bad, as it would be no cause of action that the sheriff did not arrest originally at Lane's suit, if the sheriff had Bacon in his lawful custody under the writ in that suit. As the declaration originally stood, the complaint seemed to be "that the defendant did not originally arrest at Lane's suit, and originally wrongfully did arrest under the void writ," thus showing, if the plaintiffs were right in their contention, that Bacon never was in lawful custody, and so the damage arose; and though the latter allegation is negatived by the verdict, it seems to me that to hold the declaration good without it, necessarily involves holding that the allegation "that the defendant did not arrest," has the meaning I attribute to it, viz. did not arrest, and never had Bacon in lawful custody.

The question then is, was there an arrest or lawful custody by the sheriff at the suit of the plaintiffs. The facts are, that the sheriffs had a *capias ad satisfaciendum* against Bacon at the suit of Lane, which had been lodged more than a year; that a document purporting to be a *capias* at the suit of Arambura was brought to the sheriffs by him; that this document was void for want of the formality of stamping it with a stamp at the Exchequer Office, the doing of which at that time was a matter of course; that there issued a warrant on it to Swayne to take Bacon; that Swayne did take him on that warrant; that Bacon claimed to be discharged out of custody because the supposed *capias* was void; and *459 that an order was made for his discharge, *but the sheriff claimed to detain him on Lane's writ; that Mr. Justice Coltman, by a second order, ordered Bacon to be discharged. It is also to be borne in mind that all these proceedings of the sheriff were *bond fide*, and not wrongful, wilfully, or negligently. There

not only is no evidence to the contrary, but the finding on the second breach is conclusive to this effect on the plaintiffs at least.

It is clear upon the facts, that Bacon was, if not on Swayne's original taking, at least when the sheriff claimed to detain him, in fact as much taken and in custody of the sheriff as any person ever is or can be. It cannot be necessary that the sheriff should personally seize or imprison, nor does the law recognise one place more than another as a lawful place of imprisonment by the sheriff. Then, as an actual taking by the sheriff of Bacon, or the issuing of a warrant under Lane's writ and a fresh taking under it, and a removing of him by the sheriff or bailiff to any other place, would have been nugatory, nothing more could be done, and consequently Bacon must be considered to have been in fact taken and detained by the sheriff under Lane's writ. Then why is this to be held no arrest or custody in point of law? In detaining him, the sheriff is only doing what Lane's writ commands. The sheriff has intentionally done no wrong; Bacon is where he ought to be; he has sustained no loss; and Lane is enjoying that right which the law gives him. To hold that Bacon is not in lawful custody is to do an injustice to Lane, to deprive him of his right for no default of his, and to give him instead a right, no doubt, but a right of action only for such damages as a jury may give, and against the sheriff, who is generally more, but may be less solvent than the debtor. It is also to deal unjustly by the sheriff, who, if the debt is large, may have to pay heavy damages for a small mistake; while, if the debt is small, he may pay but a very small * sum for very gross misconduct; and who, in either case, is * 460 liable to the person taken for the exact amount of the damage sustained by his wrongful act. So that to hold this in Bacon's favour is to give him more than an equivalent for the loss he has sustained by his original wrongful capture, and to enable him to deprive his creditor of his rights by availing himself of his privilege from arrest *redeundo*, as was done in this case.

This is indeed "wild justice," as the learned editors of Smith's Leading Cases say in their note to *Semayne's Case*,¹ — wrong to all parties, sheriff, creditor, and debtor. And the only argument that can be suggested in favour of the law being as the plaintiffs contend is, that otherwise the defendants would take advantage of their own wrong. The advantage to the defendants is, that they

¹ 5 Rep. 91.

do their duty to Lane; or if they are right in saying that they ought to have been permitted to retain Bacon, the advantage will be that they do so without issuing a second warrant to Swayne, on Lane's writ. The wrong is nothing, unless the omission of a form, viz. giving the second warrant to Swayne, can be called a wrong, and that omission and the whole wrong were purely unintentional; and it is strange that the defendants might by any artifice, any false pretence, have induced Bacon to leave a place of safety, and then lawfully have taken and kept him; and yet that under the present circumstances they could neither keep him, nor let him go and retake him before he had time to get away. However, suppose they have gotten an advantage, and that they have done a wrong, and thereby gotten that advantage, and that it is immaterial that the wrong was unintentional, are they taking advantage of their own wrong? Does the rule that no man shall take advantage of his own wrong apply here? I think not,

* 461 and for two reasons,—the first is, that it seems * to me that that rule only applies to the extent of undoing the advantage gained, where that can be done, and not to the extent of taking away a right previously possessed. Thus if A. lends a horse to B., who uses it, and puts it in his stable, and A. comes for it and B. is away, and the stable locked, and A. breaks it open, and takes his horse, he is liable to an action for the trespass to the stable, and yet the horse could not be got back, and so A. would take advantage of his own wrong. So, though a man might be indicted at common law for a forcible entry, he could not be turned out if his title were good. So, if goods are bought on a promise of cash payment, the buyer on nonpayment is subject to an action, but may avail himself of a set-off, and the goods cannot be gotten back. So, if I promise a man I will sell him more goods on credit if he pays what he already owes, and he does so, and I refuse to sell, I may retain the money. So, if I force another from a fishing ground at sea and catch fish, the fish are mine; other instances might be given. It seems, therefore, that the maxim referred to is inaccurately applied by the plaintiffs, and that it means that no one shall gain a right by his own wrong; and not that if he has a right, he shall lose it, or the power of exercising it, by a wrong done in connection with it; and perhaps on this distinction (but for the second reason I shall mention), had the defendants seized Bacon in Surrey, and brought him into Middlesex, they could not lawfully

have kept him there, as that would have been to give themselves a right by, and to take advantage of, their own wrong.

It seems to me, therefore, that on this ground the maxim in question is not applicable to this case. But, secondly, I think it is never applicable where the right of a third party is to be affected, as here, viz. the right of Lane; I know of no case to that effect. Can one man by his wrongful * act to another * 462 deprive a third of his right against that other? — Lane had a right to have Bacon taken and kept at any moment. Could the sheriff, by wrongfully taking Bacon, deprive Lane of that right? — It seems strange that he should be able to do so. I cannot see any principle to justify it, — and there are cases to the contrary. A. obtains goods from B. under a contract of sale, procured by A. from B. by fraud. A. sells to C.; C. may retain the goods: *White v. Garden*.¹ Surely A. might recover the price from C. at which he sold to him; yet he would, in so doing, take advantage of his own wrong. So, if my lessee covenants, at the end of his term, to deliver possession to me, and in order to do so forcibly evicts one to whom he had sub-let for a longer term, and I take possession without notice, surely I can keep it; at least at the common law I could. So, if a sub-lessee at an excessive rent purposely omits to perform a covenant, the performance of which would be a performance of the lessee's covenant to his lessor, and by such non-performance the lessee's covenant is broken, and the first lessor enters and avoids the lease and evicts the sub-lessee, the sub-lessee may defend himself against a claim for rent by his lessor: *Logan v. Hall*.² Yet there he takes advantage of his own wrong, because of the right of the third person. So, if I sell goods, the property not to pass till payment or tender, and the vendee has a week in which to pay, and during that week I resell and deliver to a third person, no action is maintainable against me as for a detention or conversion, but only for non-delivery; yet there I take advantage of my own wrong, because the right of a third party has accrued. On these grounds, then, it seems to me that the maxim in question is not applicable to the present case.

* It is also said that the reason why there was no arrest * 463 by the sheriff under Lane's writ is, because an arrest under one writ only enures as an arrest under others when it is lawful; and no doubt that may be so if there is nothing more than the

¹ 10 C. B. 919.

² 4 C. B. 598.

mere arrest by the bailiff. For example, if Bacon had escaped from Swayne immediately on his arrest, the sheriff could not have justified breaking open a house, on fresh pursuit, to take him at Lane's suit, as on an escape. But to apply that reason to the present case is to beg the question, and to lose sight of the fact that the sheriff in fact did take Bacon, and have him in his custody on Lane's writ.¹ And surely it cannot be doubted that, if Bacon, while the sheriff was claiming to detain him on Lane's writ, had escaped, the sheriff would have been liable to an action for an escape.

It is further said that the proper mode for a sheriff to execute a *capias* is by warrant to a bailiff. But with submission it seems clear that he may execute process himself, and his under-sheriff may execute it by virtue of his general authority. Pleas by a sheriff justifying under process never did set forth any warrant, but always alleged that the sheriff himself did the act complained of. The law is so laid down in *Dalton*;² and in *Norton v. Simmes*³ it was held that an arrest by an under-sheriff was a good arrest; and the under-sheriff is described as "in the nature of a general bailiff errant to the sheriff," and "an under-sheriff is in effect but a sheriff's deputy." Now it is in this case expressly stated that the deputy of the sheriff, the under-sheriff, claimed to detain Bacon under Lane's writ. It seems to me absurd, as well as contrary to the authorities above cited, to say that any additional power

*464 to detain *Bacon could have been acquired either by a warrant being issued to take him who was already taken and in custody, or by the under-sheriff or sheriff physically taking hold of Bacon, or putting him in Whitecross Street prison, in preference to any other place of detention. It seems to me, therefore, that there were a lawful caption and custody of Bacon under Lane's writ, though there was no warrant on it, whether that caption or custody is considered as made by the sheriff through the under-sheriff, or whether it is considered as made by the under-sheriff by virtue of his general power.

But it is further objected, that as the original taking of Bacon by Swayne was a false imprisonment at the sheriff's command, the sheriff never could take or detain him till that unlawful imprisonment had ceased. In the first place, I ask why? And I am aware of no answer, except that founded on the maxim I have adverted

¹ See the judgment of Mr. Baron Parke, 9 Exch. 171.

² Sheriffs, c. 21, p. 106.

³ Hob. 13, 14.

to. It is said the law is very tender of the liberty of the subject. No doubt, and properly; but the liberty of the subject is protected by rational, and not arbitrary provisions. This principle of the law must operate according to rules of law, and not independently and in violation of them. I have endeavoured to show that legal rules and principles would be violated by holding that Bacon was not in custody, and that the liberty of the subject may be sufficiently vindicated without holding that he was not.

But let us try to put this argument into the shape of a general proposition thus: "Wherever a man is taken or imprisoned unlawfully, he must be free before he can be lawfully taken and imprisoned." That cannot be true; for it cannot be doubted that if an entire stranger to the sheriff forcibly took a person, against whom the sheriff had a *capias*, to the sheriff or to a bailiff with a warrant on that *capias*, the debtor might and must *465 be detained. This is clear from *Howson v. Walker*,¹ and from *Robinson v. Yewens*.² The proposition then must be limited. Try it thus: "Wherever a man is taken or imprisoned unlawfully by any person or his agents, he must be set free by that person and his agents before he can be lawfully taken by them." But is that true? Would it be contended that if the defendants had had process against Bacon for treason or felony, he could not have been detained, but must have been let go at large? There must, then, be another limitation of the general rule denying the inability to detain, limited to an inability to detain on civil process. But if so, what is the reason of the rule? If regard for the liberty of the subject is not enough to justify the rule to the extent to which I first supposed it, why is it enough to justify it to the limited extent I have last supposed? To this no answer is given. Further, the two cases of *Howson v. Walker* and *Robinson v. Yewens* are both opposed to such a proposition. Still further, this case is not within that limited rule. For it cannot be supposed, nor is there evidence, that the sheriff himself issued the warrant on Arambura's pretended writ; nor did he in fact or in law authorise the under-sheriff to issue warrants on any but true writs. Now, though he might be liable for the unauthorised use of his seal by the under-sheriff, yet if he had revoked that under-sheriff's authority, and himself personally appeared before the Judge and claimed to detain Bacon, why should he not? Suppose the under-

¹ 2 W. Bl. 823.

² 5 M. & W. 149.

sheriff had fraudulently and knowingly issued the warrant under Arambura's pretended writ; how could that be said to be the act of the sheriff? The under-sheriff has no authority to commit a fraud, nor has he, as between him and the sheriff, authority *466 to issue *warrants where there are no writs. Why, then, might not the sheriff say in this case: "I did not authorise the unlawful taking of Bacon; I may indeed be liable to him for it, but as I did not authorise it, it was not by me or my agent he was unlawfully taken; therefore it is as though a stranger took him, and I consequently may lawfully take and hold him."

I cannot, then, see any reason or rule to justify the plaintiff's contention; but while I can see no reason to justify the law being as the plaintiff contends it is, there does appear, in addition to the considerations of convenience and justice which I have mentioned, a strong reason in point of law in support of the defendant's contention. It cannot be said that the custody at Lane's suit was wholly null, that is to say, Bacon might, if he pleased, have assented to it, so that a discharge by Lane would have been a satisfaction of the debt; and had Bacon taken no steps to get discharged for a reasonable time, he would have lost his right to object to continuing in custody; if so, Bacon had an option to consider himself in custody, at Lane's suit, or not, as he pleased, and he had that option during a reasonable time, to ascertain the facts and make his complaint to the Judge, and procure his discharge; and, had Mr. Justice Coltman, erroneously (as the plaintiffs would say), refused to discharge him, he would have had that option till the then following Michaelmas term, a period of three months. This, in truth, would have been an option as against Lane, who, during that time, would have been unable to take, with certainty, any proceedings founded on Bacon's being in lawful custody. How did Bacon get such an option against Lane? How did Lane get put into the situation of having such an option against him? Not by any thing Lane did, but by the act of the sheriff. But *467 can it be in the power of one *man, by the breach of duty which the law casts on him, to prejudice the position of an innocent third party in this way? As a matter of reason and principle, then, I think the plaintiffs wrong in their contention, and the defendants right in theirs.

But it is said that the authorities are in the plaintiffs' favour,

and I therefore proceed to consider them. The earliest seems the 18th Edw. 4, 4, cited and approved in *Semayne's Case*.¹ It was there held, that though the sheriff in executing a *feri facias* ought not to break open an outer door, yet if he does, and seizes, the execution is good, though he is a trespasser in entering the house, and liable to an action for it. The case is identical with the present, except that here the execution is against the body. The sheriff has procured possession of the goods and the body wrongfully; yet he may rightfully detain the goods,—why not the body? *Thurland's Case*² is the same way. There a person had been illegally taken by the sheriff, at the instigation of one who is called the plaintiff's factor, but who had no authority to commit the particular illegality; and a valid writ having been procured, the custody was held lawful. *The Countess of Rutland's Case*³ is not inconsistent with this; she was unlawfully imprisoned and on a false ground, until the sheriff took her; it is observable that he is not indicted. Nor is *Kerbey v. Denby*,⁴ for there the entry was justified, which was part of the illegal act. It is not to be lost sight of, however, that in *Percival v. Stamp*,⁵ a distinction is suggested between takings of the body and of goods, which is also discussed and doubted in Smith, Leading Cases.⁶

* The first two cases would justify the proposition to the * 468 full extent, namely, that where there is no personal default in the suitor, he is entitled to the benefit of the execution, let the sheriff have executed it as he may,—which I own seems to me but reasonable. But there are other cases which no doubt go to show that the suitor on whose behalf the original wrong was committed, must suffer thereby, but no other, and this may be on the ground that the sheriff is the suitor's agent, or in the nature of one, to execute his process; as it is well known that the execution of process is conducted a very great deal on the personal directions of the party or his attorney. So that the act of the sheriff is to some extent that of the suitor; and then the maxim that no one shall take advantage of his own wrong might properly apply. *Hall v. Hawkins*, Parke, Baron,⁷ and *Eggington's Case*, Lord Campbell.⁸ Of course, if such an argument is well founded, the person wrong-

¹ 5 Rep. 91—93 a.

² 2 Dyer, 244 b.

³ 6 Rep. 52 b—54 a.

⁴ 1 M. & W. 336.

⁵ 9 Exch. 167.

⁶ Vol. 1, p. 86, n.

⁷ 4 M. & W. 590.

⁸ 2 Ellis & B. 730.

fully arrested would properly be discharged at the suit of the person on whose behalf the wrong was committed; but no such argument is applicable to the case of a third person, as Lane. For though, on the same reasoning, the sheriff was Lane's agent to execute his writ, misconduct in executing Arambura's writ was no misconduct as agent of Lane. If Bacon is to be considered as having been taken at Lane's suit when first seized, no doubt that seizure was unlawful. But why should it be so held, when it is borne in mind that the very reason why that capture was unlawful was because Swayne had no command from the sheriff to arrest at Lane's suit? It seems monstrous that to make the act of taking illegal it may be said there was not an arrest at * 469 Lane's suit, and that to make the * subsequent custody illegal that there was an arrest at Lane's suit.

The following cases support this view: *Howson v. Walker*,¹ where the detention at the suit of the third party was held good, though the Court expressly held the arrest to be illegal, and discharged the defendant at the suit of Howson for that reason; *Arundel v. Chitty*; ² and in *Eggington's Case*,³ Lord Campbell, and Coleridge, and Erle, justices, gave their judgment, discharging the prisoner on the same ground.

The two cases, *The Attorney-General v. Dorkings*,⁴ and *The Attorney-General v. Carl Cass*,⁵ and *Barlow v. Hall*,⁶ are cases of misconduct by the party, and not by the officer. The cases of *Ex parte Ross*,⁷ and *Ex parte Hawkins*,⁸ were also cases of no illegality by the sheriff, who was bound to arrest, but of privilege in the persons arrested, viz. a privilege *morando* and *redeundo*, and they might properly be said to be *redeundo* till they were out of all custody. Those cases may be shown to be different from the present in this way, that Lord Eldon says the parties must have notice; but in the present case Mr. Justice Coltman held that Lane had nothing to do with the question of the propriety of the arrest, which was a question between Bacon and the sheriff only.

The Cases of Pearson, of Collins, and of Robinson v. Yewens,⁹ are decided on other considerations, viz. in *Collins v. Yewens*, and

¹ 2 W. Bl. 823.

² 1 Dowl. P. C. 499.

³ 2 Ellis & B. 717.

⁴ 11 Price, 156.

⁵ 5 Bing. N. C. 489, 10 A. & E. 570, 5 M. & W. 149.

⁶ 11 Price, 345.

⁷ 2 Anstr. 461.

⁸ 1 Rose, 260.

⁹ 4 Ves. 691.

Pearson v. Yewens, on the ground of collusion by the sheriff with the original wrongful taker; and in *Robinson v. Yewens*, on the ground that there was no such * collusion, and conse- * 470
quently that the sheriff might detain. The first two cases, therefore, held that the sheriff was wrongful in his attempt to detain for the plaintiffs in those cases; and the last case, escaping from the injustice of *Barratt v. Price*¹ held that he was not, and the decisions were accordingly. However, it cannot be denied that they affected to be guided by *Barratt v. Price*, and that is the first case that I can find where it was held that there being no wrong in the party issuing the process, and no wrong in the officer in the actual execution of that process, but some wrong by him in the original capture of the debtor under other process, the rights of the first and innocent party were prejudiced, and that the debtor could not lawfully be detained at his suit; and, indeed, it is the first case where that was held true of the party at whose suit the arrest was, where there was no personal misconduct in him or his agent; for in the case of *Howson v. Walker* it seems tolerably clear that the defendant was kept in illegal custody by Howson's attorney till he could get the officer and the warrant.

Now in *Barratt v. Price* the ground of decision is, that the first arrest was illegal by the wrongful act of the sheriff himself. The only reason given why that should be a ground is, "that where the sheriff has by his own act illegally arrested the defendant, the defendant is not in custody under the first writ, he is suffering a false imprisonment, and such false imprisonment being no arrest in the original action, cannot operate as an arrest under the other writs lodged with the sheriff"; but why this is so is not said, and even if true as to the original arrest, it is, I have observed, simply begging the question as to the subsequent detention. To make the sentence complete, * and applicable to the case to be de- * 471
cided, it should have proceeded thus: "and the sheriff cannot independently arrest or detain under the other writs." But why? No reason is, nor, I think, can be given.

The case of *Howson v. Walker* is undistinguishable from *Barratt v. Price*, and is misunderstood in the judgment of Lord Chief Justice Tindal. He says, the illegal arrest by Herne was no act of the officer or sheriff. But the Court in *Howson v. Walker* said, that an illegal arrest will not protect a man against his other cred-

¹ 9 Bing. 566.

itors; he must still be amenable to law, unless some privity or collusion be shown, and the circumstance of employing the same officer does not amount to any proof of that, and so discharged the defendant at the suit of Howson, but detained him at the suit of Crowden; clearly, therefore, holding that, as to Crowden, he was in lawful custody, though illegally arrested at Howson's suit. And in *Robinson v. Yewens* (which being in a Court of co-ordinate jurisdiction would of course be governed by *Barratt v. Price*), it may be observed that, according to the authorities, the sheriff would have been clearly liable to an action for the first arrest by Sloman, which was wrongful, — and therefore, according to the dictum in *Barratt v. Price*, this should have prevented the sheriff from arresting afresh or detaining. It is true that in *Barratt v. Price* the officer endeavoured to make the original arrest appear legal, and it may be said thereby identified himself with it; but it is equally manifest that the officer in *Howson v. Walker* did the same; and how in reason could it be that Barratt lost his right to detain Price, because the officer Jackson endeavoured to screen his son's misconduct, when if he had thought fit to disavow his son's conduct, and had himself taken Price, it seems, according to the judgment in *Barratt v. Price*, that Jackson might have

* 472 detained him, and treated his son's act as the * act of a stranger not connected with the officer. It is true, according to the report in Moore and Scott, that the son was assisting his father in the execution of the warrant; but surely that ought to make no difference, as otherwise a plaintiff has an additional peril, and may lose the fruits of his execution from the misconduct of the sheriff, the bailiff, or the bailiff's man.

With respect to *Hooper v. Lane*,¹ it is enough to say, no reason is given for the opinion there expressed. It is founded on the authority of the *Countess of Rutland's Case*, which is misunderstood.

There is a further argument in favour of the defendant. Lane's writ commanded the sheriff to have the body of Bacon at Westminster to satisfy Lane. The theory of the writ is, that the defendant is brought to the Court, and on not satisfying the plaintiff, is put into the prison of the Court; why, when he is brought there by the sheriff, should the Court not give the plaintiff his right?

It seems to me, then, that the authorities and legal principles,

¹ 10 Q. B. 546.

reason and convenience, justify me in saying that an execution, however irregularly executed, is good for the benefit of the party where he is void of blame ; but if that proposition is too extensive, then I think at all events it is good for a party's benefit, where there is no irregularity in the executing of his execution, though there may have been a wrong or irregularity by the sheriff in his conduct to the defendant in relation to some other execution ; consequently, that in this case, Mr. Justice Coltman's order was wrong ; Bacon was taken by the defendants, and in lawful custody at Lane's suit ; that Lord Denman misdirected the jury ; that judgment ought to be reversed, and a *venire de novo* awarded.

I have not as yet noticed a distinction between this case *and *Barratt v. Price*, because I have been addressing *473 myself to the question whether or no Bacon was *de jure* in custody ; and on that question I think *Barratt v. Price* is not to be distinguished from this case. No doubt there is a distinction between this case and *Barratt v. Price* in this, that there was no intentional wrong in the defendants or their officer. This difference would be important if Bacon had no legal right strictly so called, but a mere power of calling on the Court to exercise its discretion to prevent an abuse of its process. I believe this is all he really had, — a question I shall presently consider ; but if Bacon had a strict legal right, I think the *bond fides* of the defendants makes no difference ; for the right, if right at all, of Bacon to complain, is the same as that which Price had, viz. a legal wrong done him. But I think *Barratt v. Price* wrongly decided, and that it will be best at once to overrule it. Of course it is advisable to abide by decided cases if possible, but this is not like a case affecting contracts, or a matter in reference to which people act and make their arrangements, where any change in the law unknown to most people is no doubt *per se* inconvenient. *Barratt v. Price* is a case which determines what shall be done where a wrong or blunder is committed. People do not act on the supposition that such things will occur, or if they do so act they deserve but little consideration. I may observe that this case is in this dilemma, if the judgment is affirmed, and no reason given except the authority of *Barratt v. Price*, no principle will be settled, no certainty obtained, and litigation will not be prevented. If any principle is laid down, it seems to me it must, to be of any use, be of some general character to this effect, that wherever the sheriff, his offi-

cers or bailiff, or any of his assistants, in any way does or sanctions any thing illegal in or towards arresting a person, all that
 *474 person's creditors, * including the one at whose suit he was arrested, not only have him not arrested, but lose the right of arresting him till he has determined within a reasonable time whether or not he will apply to be discharged, and if he does so apply, until the Court has determined whether he shall be: a general rule which it seems to me would be most mischievous and unjust.

But there appears to me another reason why the judgment should be reversed, and a *venire de novo* awarded, even if Mr. Justice Coltman's order was right, and the sheriff was not entitled to detain Bacon at Lane's suit, namely, that Bacon had no legal right, strictly so called, to be discharged, but a mere power of calling on the Court to exercise a discretion to discharge him to prevent abuse of its process. Now, the breach found for the plaintiffs is, that Bacon was not arrested at the suit of Lane, which I think means, was never in custody at Lane's suit; but whether it has that meaning or not, I think it is equally disproved; for it is clear that if Bacon had been brought before a Judge or Court on a *habeas corpus*, and the detention under Lane's writ returned, he must have been remanded. Further, suppose Bacon had sued Swayne for arresting him, Swayne would have been without justification; but had Bacon sued the defendants, it seems clear they could have justified; for if not, Bacon might have stayed in prison for a year, and then got himself discharged, and sued the sheriff, who would have been without justification under the writ, for no lapse of time could make that writ a justification which was not so originally. Besides, what would have been the course of pleading? Bacon would have alleged an imprisonment by the defendants. They would have justified under Lane's writ. If Bacon then new assigned that he complained of a different trespass,
 *475 namely, a taking under Arambura's pretended writ, * he would indeed have been entitled to recover for all the trespass, up to the taking under Bacon's writ, but he would have admitted the validity of that taking. He must, therefore, have replied in some way to that plea. Would it have been a good replication to state the facts and say: "True, you had a good writ against me, but you had a bad one; you took me under the bad one, and kept me afterwards under the other"? I think not. It

is clear that if a man has a good and bad cause, and acts under the latter, he may justify under the former: *Oates v. Wood*,¹ and *Dr. Grenville's Case*.²

This affords an answer also to the assertion, that the defendants could not justify this taking: perhaps not up to where Bacon was in their actual custody; but thence they could. Bacon in truth had no right to be discharged, but the Court, to prevent an abuse of its process, had power to discharge him.

The plaintiffs' complaint, therefore, if well founded, should have been in form, that though the defendants took Bacon, yet they took him under such circumstances as to give him an option of being discharged, if he thought fit; and he availed himself of it, and so Lane was damaged. Perhaps the declaration originally meant this, — and this is important in substance; because thinking, as I do, that Mr. Justice Coltman exercised an erroneous discretion, I think that if any action had been maintainable for such a complaint, the damages might have been very different to the present. On this ground, also, I think the direction wrong, even if *Barratt v. Price* is law.

Upon the point of no judgment being entered for the defendants, on the plea of not guilty, as to the part found for them, I think the defendants are entitled to judgment on that. I think that the Common Law Procedure Act, *1852, section *476 157, does not apply to authorise your Lordships to give such judgment as the Queen's Bench ought to have done; for the words of the section are, "as the Court, i. e. Exchequer Chamber, from which error is brought, ought to have done." But, independently of that statute, I think that Court, and consequently the House of Lords, could give the proper judgment. See *Pollitt v. Forrest*.³ If not, this defect ought to be amended.

I am further of opinion that there is nothing in the defendant's objection that the finding on the first plea to the second breach, and the finding as to the seventh plea, are repugnant. It is enough to say that the findings are not repugnant, for the seventh plea does not put in issue the words "wrongfully, unjustly, and illegally," which are denied by the general issue, and the materiality of which is shown by the judgment in this case in the Queen's Bench.

¹ 2 M. & W. 791.

² 11 Q. B. 962.

³ 12 Mod. 386; s. c. nom. *Dr. Groenvelt's Case*, 1 Ld. Raym. 213.

In conclusion, I answer your Lordships' questions as follows:—

The first, in the negative.

The second, in the affirmative.

Third, there was no evidence of a breach of duty in arresting under Arambura's writ. But as a sheriff is bound to arrest as soon as he can, and as the sheriffs could have arrested under Lane's writ, when they arrested under Arambura's, there may have been evidence of a breach of duty in neglecting to arrest at Lane's suit as soon as they could; but that is not the breach of duty complained of, nor in respect of which damages have been given.

Fourth, I answer this question in the affirmative.

And the fifth in the negative.

MR. JUSTICE CROWDER. — To your Lordships' first question, "Whether when the officer of the plaintiffs in error took *477 Anthony Bacon into *custody at the suit of Arambura, he was in their lawful custody under the valid writ of *ca. sa.*, which was in their hands at the suit of the defendants in error," I answer in the negative.

The facts of the case lie in a very narrow compass. [His Lordship stated them.]

Now the law is clear that when there are several writs in the sheriff's hands, and he issues a warrant upon one to his officer who arrests the defendants, such arrest operates as an arrest on all the writs then in the sheriff's hands. And the plaintiffs in error contend that as Swayne, the officer, had a warrant upon Arambura's writ, upon which he arrested Anthony Bacon, such arrest operated as an arrest on the *ca. sa.* of the defendants in error, and that so Anthony Bacon was lawfully in the sheriff's custody. Had the arrest been lawful under Arambura's writ, that would clearly have been so. But it seems to me as clearly the contrary, when it appears that Arambura's writ was invalid upon the face of it, and that therefore the arrest by Swayne was unlawful. It would be a strange anomaly, and at variance with every principle of law, if a trespass which subjects the sheriff to an action for wrongfully depriving a man of his liberty, could enure as a lawful arrest or detainer for any purpose whatever. It cannot be doubted that whenever the writ is a nullity upon the face of it, the sheriff who arrests upon it is liable to an action for false imprisonment. The

liberty of the subject has at all times been estimated by the law of England at so high a value, that the slightest attack upon it has been held actionable; and, therefore, when the law prescribes certain formalities as requisite to make an arrest valid, the omission of any of them renders the arrest illegal, and subjects the sheriff to an action. It seems to me, therefore, quite plain that, although a valid arrest on one of *several writs *478 operates as an arrest on all, and so places the party arrested in the lawful custody of the sheriff, under each of those writs; yet that an unlawful arrest, for which an action for false imprisonment would lie against the sheriff, is no arrest at all, and gives no lawful custody of the party arrested to the sheriff.

To your Lordships' second question, I answer also in the negative. Anthony Bacon was brought before Mr. Justice Coltman to be discharged, because he was unlawfully in the sheriff's custody by an act which rendered the sheriff liable in damages for false imprisonment. The Judge ordered his discharge out of the sheriff's custody, which I think he was bound to do, notwithstanding the under-sheriff claimed to detain him upon the *ca. sa.* of the defendants in error; Bacon having been unlawfully arrested by the sheriff, there was no detainer upon any of the writs in the sheriff's hands; all that the Judge had before him was a pretended writ invalid upon the face of it, a warrant upon that writ, and an arrest under the warrant. The sheriff being a wrongdoer, and liable as such to an action for false imprisonment, tried to avail himself of a certain writ in his possession under which he might have lawfully arrested the debtor, in order to save himself from the consequences of his negligence on the discharge of the debtor out of custody. When he sought to detain Bacon at the suit of the defendants in error, he did so, not in the interest of the defendants in error, but to save himself harmless, well knowing that if Bacon, after being discharged, could not be retaken, he, the sheriff, would be fixed with damages probably to the amount of the debt due to the defendants in error. All the arguments, therefore, at your Lordships' bar, on the part of the plaintiffs in error, as to the extreme hardship on the defendants in error that the wrongful act of the sheriff, assuming it to be *a wrongful act, should deprive *479 them of their execution against the body of Bacon, seem to me to be of little weight. The defendants in error did not complain, nor do they now complain, that Mr. Justice Coltman

discharged Bacon. A plaintiff is entitled to have his writ put in execution with due diligence, and if any damage results to him from the sheriff's negligence, the sheriff must reimburse him for any loss thereby sustained. The defendants in error were perfectly satisfied with the sheriff's security instead of that of their debtor. And, generally speaking, no damage in fact results to a plaintiff who attempts to take the body of his debtor, where the sheriff is substituted for such debtor. In case, therefore, of an illegal arrest by the sheriff's misconduct, the sheriff is made responsible for damage arising to other creditors whose writs are in his hands, from the discharge of the debtor out of custody; because he could have made, and therefore ought to have made, a valid legal arrest upon each of their writs, by which the debtor would have been in lawful custody. In the present case, the sheriff was alone to blame for the unlawful arrest. It was contrary to the sheriff's duty to issue his warrant to the officer upon a writ appearing on the face of it to be invalid. Had he exercised the most ordinary attention, and looked most cursorily at Arambura's pretended writ, which was not signed, he must have perceived that it gave him no authority to arrest Bacon. Therefore, although the penalty is great, it cannot be denied, I think, that it was gross carelessness in the sheriff to issue his warrant on such an invalid writ. The whole force of the argument on his behalf amounts to this, that he is too severely punished for his carelessness.

But whatever weight there may be in the reasoning of the plaintiffs in error upon principle, the authorities seem conclusive * 480 against them. In *Ex parte Ross*, in Rose's *Bankruptcy Cases, the sheriff's officer had arrested an uncertificated bankrupt while attending the commissioner on his final examination. Application was made to Lord Eldon for his discharge upon the ground of privilege; and although it was opposed by other creditors who had writs of *ca. sa.* in the sheriff's office at the time, and who were precisely in the same position with reference to the prisoner and the sheriff as the defendants in error in the present case, the prisoner was discharged out of the custody of the sheriff. In that case, although the arrest was illegal, not because the writ was void, but because the debtor was at the time privileged from arrest, which it was said the sheriff ought to have known, yet the position of the debtor when brought before Lord Eldon by the sheriff to be discharged was exactly the same as that of Anthony Bacon

when before Mr. Justice Coltman. In both cases, the debtor arrested was then in the actual custody of the sheriff, who held writs of *ca. sa.* from other creditors wholly innocent of the unlawful arrest. The same reason which induced Lord Eldon to order the discharge in the one case would justify the Judge's order in the other.

In *Ex parte Hawkins*,¹ there was a discharge by Lord Loughborough under similar circumstances. And I take it that these decisions proceeded upon the ground that the sheriff was to blame for making such an arrest, and that he could not avail himself of his own wrong to detain in custody one who had been thus wrongfully brought into it.

The case, however, mainly relied on by the defendants in error is *Barratt v. Price*,² where the sheriff's officer had inveigled the debtor, against whom many writs lay in the sheriff's hands, into the sheriff's custody, and there he * was arrested upon * 481 a legal warrant issued by the sheriff upon a legal *ca. sa.* And it was held that the prisoner was entitled to his discharge, not only as against the creditor at whose suit he was wrongfully arrested by the contrivance of the party with a sheriff's officer, but also as against all the other creditors whose writs of *ca. sa.* were then in the sheriff's hands, and who were in no way concerned in the arrest. This case is denied to be law by the plaintiffs in error, and if law, is alleged to be distinguishable from the present case. First, is it law? It has been recognised and acted upon in many cases since decided in each of the three Common Law Courts of Westminster Hall. Its principle has been frequently explained and approved of, and it was not suggested at the bar that any Judge had ever expressed a doubt of the correctness of that decision. It was a considered judgment pronounced in 1833, by a very eminent Judge, Chief Justice Tindal, as the opinion of the Court of Common Pleas, and since then in 1839 it has been recognised as law in the Queen's Bench, in *Collins v. Yewens*,³ and in the same year in the Common Pleas, in *Pearson v. Yewens*,⁴ and in the Court of Exchequer in *Robinson v. Yewens*.⁵ It has been since brought prominently before the Court of Queen's Bench in the year 1841, in *Barrack v. Newton*,⁶ and assumed to be law by that Court.

¹ 4 Ves. 691.

² 9 Bing. 566.

³ 10 A. & E. 570.

⁴ 5 Bing. N. C. 489.

⁵ M. & W. 149.

⁶ 1 Q. B. 525.

And recently in *Eggington's Case*,¹ it has been again solemnly recognised by Lord Campbell and the other Judges of the Queen's Bench, and explained by Mr. Justice Coleridge. To which list of authorities may be added this very case of *Hooper v. Lane*, in *482 the Exchequer Chamber,² where the same doctrine * was confirmed by the late Lord Truro, delivering the judgment of the Court of Exchequer Chamber.

After such a mass of authorities, and the concurrent opinion of so many Judges in its favour, it seems to me difficult to maintain that the doctrine laid down in *Barratt v. Price* is not law. But it is said, nevertheless, not to be law, because it is at variance with prior authorities, and with reason and good sense. Is it at variance with prior authorities? The old case in the Year Book³ is cited as against it. There, in executing a *fi. fa.* illegally, it was held that though an action lay for the breaking, &c. yet that the value of the goods taken could not be recovered back because the execution creditor was entitled to them under his *fi. fa.* And it is argued that the law must be the same whether goods are taken under a *fi. fa.*, or the body of the debtor under a *ca. sa.* But I have always considered the distinction clear in law between the two cases; and that although the goods may be retained on an illegal seizure, the body cannot be detained on an illegal arrest, upon the ground of the immense importance constitutionally attached by the common law to personal liberty. And I find the Judges in *Percival v. Stamp*⁴ adverting to this distinction. In that case it was assumed at the bar that under an illegal arrest the body of the debtor could not be detained, and an attempt was made in argument to assimilate the wrongful seizure of goods to a wrongful arrest. Chief Baron Pollock there says: "With respect to an arrest of the person, the decisions have proceeded on the principle that the subject is not to be deprived of his liberty by means of an illegal act on the part of the sheriff. If a sheriff *483 illegally arrests a debtor, that is a false imprisonment, * and therefore the sheriff cannot detain him under a subsequent legal writ, but is bound in the first place to give him an opportunity of going at large. But in the case of an execution against goods, there is no analogous injury, and we ought not to establish a new principle when no authority can be found to support it";

¹ 2 Ellis & B. 717.² 18 Edw. 4, Pasch. 4 a, pl. 19.³ 10 Q. B. 546.⁴ 9 Exch. 167.

and Baron Parke says: "Mr. Hill has relied upon the authorities with respect to an arrest of the person. No doubt, if an arrest be made on a Sunday, or in any way not authorised by law, the sheriff cannot afterwards make that valid by detaining the party under a legal writ, but must first give him an opportunity of going at large, and then execute the legal writ. But that is not so with regard to an execution against goods; and therefore in this case the illegal seizure did not prevent the defendant from afterwards executing a legal warrant. The same principle ought not to be applied to an execution against the person and an execution against goods."

In answer to this strong body of authority, I can only discover one single case which appears to have an opposite tendency, and that is *Thurland's Case*.¹ The report, which is rather obscure, alleges that a factor or agent of the plaintiff had colluded with the sheriff to arrest the defendant without any lawful writ or warrant, and when so arrested had procured a *ca. sa.* for the plaintiff's debt to be handed to the sheriff, who thereupon detained him under it, and upon application for his discharge the report says that the Court fined several persons, and amongst others the sheriff and the plaintiff's factor, for their misconduct, but refused to discharge the defendant out of custody, because the plaintiff was proved not to have been privy to the wrongful arrest, and there was a *bond fide* debt due to him from the defendant. Although the agent acting for * the plaintiff's benefit was fined, yet the * 484 plaintiff was allowed to take advantage of his agent's act, because it was not proved that he was himself privy to it, — a very dangerous doctrine, to say the least of it, and not likely to be followed at the present day. I may observe also that *Thurland's Case* is not even referred to in any of the later cases which have been brought to our attention.

*Howson v. Walker*² is also much relied upon by the plaintiffs in error as an authority adverse to *Barratt v. Price*. But I think the true distinction between the two cases is taken by the Court both in *Barratt v. Price*, and also in *Collins v. Yewens*.³ In *Howson v. Walker* it was a stranger who committed the trespass under which the defendant came into the custody of the sheriff, and a second arrest was regularly made under a regular writ and war-

¹ Dyer, 241 b, and 244 b.

² 10 A. & E. 570.

³ 2 W. Bl. 823.

rant by the sheriff's officer, not in collusion with the party making the first arrest. Chief Justice Tindal says, in *Barratt v. Price*: "But the plaintiff relies on the case of *Howson v. Walker* as decisive in his favour. Upon looking, however, at the facts of that case, we think it is distinguishable from the present. In that case Herne, who broke into the house and made the arrest, does not appear to have been connected with the sheriff's officer, who held the warrant and afterwards made the arrest under it. In the first place, no warrant whatever had been made out to Herne. Again, when Howse, the sheriff's officer, to whom the warrant in the action was directed, heard of the transaction, he went to the defendant, and having another warrant also against him at the suit of Crowden, carried him to jail, and charged him with both these actions. The sheriff's officer, therefore, did nothing to identify himself with Herne. The illegal arrest of the

* 485 * defendant by Herne was no act of the officer or the sheriff, but the act of a stranger. The taking the defendant to prison, and charging him in the action at the suit of Crowden, was in fact a new arrest rather than a detainer, and there was no more objection to the sheriff arresting the defendant in this second action, because at the time he found him he was illegally imprisoned, than if he had found him at large." Also, in *Collins v. Yewens*, Lord Denman, having cited the language of Chief Justice Tindal, in *Barratt v. Price*, adds: "It is obvious that the same observations will apply, where the first arrest is by a mere stranger and wrongdoer; for in such a case, the writs in the sheriff's office cannot operate. But if in such case a bailiff having a warrant, arrests the defendant, already illegally in custody, without collusion with those who so have him in custody, such arrest is legal, inasmuch as the defendant is not by such illegal custody privileged from arrest under legal process; and this is the true ground of the decision in *Howson v. Walker*."

But it is further argued, on behalf of the plaintiffs in error, that assuming *Barratt v. Price* to be law, it only decides that a subsequent detention upon a valid writ after an illegal arrest cannot be made where the illegal arrest was effected by the "misconduct" of the sheriff in making the arrest, which the Court in *Barratt v. Price* held to have been proved in that case. Whereas, in the case at bar, it is said, there was no such misconduct of the sheriff, but merely a mistake in arresting upon an invalid writ. Surely

the short answer to this is, that whenever the conduct of the sheriff in making the arrest subjects him to an action for false imprisonment, the law must regard such conduct as "misconduct" in making the arrest. The result is the same to the debtor, who has equally been deprived of his liberty by the sheriff without the sanction of the law, whether by reason of a seizure without any warrant or * writ, or by reason of a seizure under a * 486 warrant issued upon a writ invalid on the face of it. The sheriff must be presumed to know, on the delivery of a writ to him for execution, whether it be a lawful writ or not. And it can hardly be doubted, I think, that issuing a warrant upon a writ invalid upon the face of it, is gross neglect of duty, and misconduct in the sheriff. Therefore the judgment of the Court below cannot be reversed without overruling *Barratt v. Price*.

Now, although I am not prepared to say, if the case were *res integra*, that I should not be disposed to treat the sheriff more leniently, yet I can find no sufficient ground for holding that *Barratt v. Price* is not law.

To your Lordships' third question, I answer, that there was evidence for the jury that the plaintiffs in error were guilty of a breach of duty towards the defendants in error in arresting Bacon on Arambura's writ. This follows, I think, from the negative answer to the two first questions. For the natural consequence of such an arrest was the discharge from custody under a Judge's order; and the arrest of Bacon under Arambura's writ is conclusive evidence against the sheriff that he could have then arrested him under the *ca. sa.* of the defendants in error. And I think there was ample evidence of breach of duty in executing a writ void upon the face of it, instead of the valid writ of the defendants in error.

To the fourth question, I answer, that in my opinion there is error in the particular suggested by that question. But I think your Lordships have power to give the proper judgment, and so do justice to the plaintiffs in error.

To the fifth question, I answer, that regard being had to the pleadings to which the several findings of the jury apply, there is no such inconsistency in those findings as makes a *venire de novo* necessary.

*MR. JUSTICE CROMPTON. — My Lords, I think that the * 487

rule of law laid down by the Court of Common Pleas in the year 1833, in the case of *Barratt v. Price*, and distinctly recognised and approved by all the superior Courts of common law in 1839, ought not now to be disturbed.

According to those decisions, an arrest which is illegal by the wrongful act of the sheriff does not operate as an arrest under, nor can the party be detained under, another writ lying in the sheriff's office at the time of the illegal arrest.

In the present case, the first arrest was under the sheriff's warrant, founded on no writ, and was an utterly illegal and unjustifiable trespass in point of law, on the part of the sheriff; and I think the rule that prevents such an illegal act from operating as an arrest, by reason of there being a writ in the sheriff's office, is wise and reasonable, and tends to prevent collusion and abuse. In the words of Mr. Baron Parke, in *Robinson v. Yewins*,¹ it is a "very proper and reasonable distinction that the first arrest must not have been illegal by the wrongful act of the plaintiff." I have heard nothing to make me think that this rule of law is either inconsistent with or unsupported by previous authorities. In several of the cases on this subject there has been a difficulty in ascertaining how far the sheriff originally was, or could by his subsequent conduct be treated as a party to the first wrongful arrest. This difficulty in the application of the rule appears to me to show the more strongly the recognition of the principle. Here there can be no doubt as to the illegal trespass being the sheriff's own wrongful act, as it was committed under his warrant to do the very act by virtue of the void writ.

*488 * I think, therefore, that when the sheriff's officer took Bacon into custody, at the suit of Arambura, he was not in their lawful custody at the suit of the defendants in error.

Neither do I think that Bacon was in the lawful custody of the sheriff at the suit of the defendants in error, by reason of any thing that passed before Mr. Justice Coltman. In *Barratt v. Price*, and the cases in 1839, the sheriff claimed to hold the prisoner at the suit of the parties having lodged writs in the office; but such detainer was held illegal where the first arrest was considered to have been the mere illegal act of the sheriff.

I should observe, that I do not find in the evidence set out on the record that Bacon was brought personally before the Judge at

¹ 5 M. & W. 152.

chambers. What is stated is, that on the hearing of the summons, Mr. Burchell, the under-sheriff, objected that Bacon ought to be detained in the sheriff's custody under the writ of the defendants in error. Even if, as seems to have been supposed, Bacon had been brought before Mr. Justice Coltman by the under-sheriff, I should not have thought him in the lawful custody of the sheriff under the circumstances.

I answer your Lordships' first and second questions, therefore, in the negative.

In answer to your Lordships' third question, I think that there was some evidence of negligence as against the defendants below in not arresting Bacon at the suit of the defendants in error. Attending, as your Lordships desire us to do, to the pleadings and the evidence, I understand the third question to inquire whether there was any evidence of negligence under the first breach for non-arresting, by reason of the plaintiffs in error having arrested Bacon under the void writ, so as to prevent any arrest or detainer at the suit of the defendants in error. I think that this matter is properly explained by Lord Truro, in delivering * the * 489 judgment in the Exchequer Chamber, where he points out the mode of leaving this question of negligence to the jury; though I am not satisfied that I should have agreed with the jury in finding that the negligence was established. This, however, could only be ground for a new trial, as in a verdict against evidence. And thinking that there was some evidence, I answer the third question in the affirmative.

As to the fourth question, the judgment appears to me clearly erroneous, by reason of judgment not being entered up for the defendant, on the part of the issue found for him. But this appears to me to be of little consequence, as I presume that your Lordships will (as you clearly are at liberty to do) correct the judgment by ordering judgment on the part of the record in question to be entered in the proper form for the defendant.

As to the last question, I answer that there is no inconsistency in finding the general issue on the whole of the second breach for the defendants below, and finding the particular issue as to the fact of the arrest under the void writ for the plaintiffs below.

The Exchequer Chamber having thrown out, in the case as reported in the tenth Queen's Bench Reports, that it might be doubtful whether the second breach was free from objection, it was

wise and right in the plaintiff, succeeding on the first breach, to allow the verdict to pass for the defendants on the second ; and it was the more proper course that the plaintiffs should not recover damages in the two breaches for the same negligence. It is therefore found, with respect to the second breach, that the defendant was not guilty of arresting Bacon under an illegal warrant, so as that the plaintiff lost thereby the opportunity of having him taken under the good writ. The plea and verdict in the general issue

as to this second breach negatives, as regards that breach,
 * 490 the whole cause of action made up of * the negligence and its consequences. The arresting Bacon under the illegal writ, however negligent, would not in itself give a right of action to the plaintiffs below ; but it is only that negligent arrest, when coupled with or followed by the other circumstances, as consequences of such arrest, that can be supposed to give a right of action. Then the verdict on the seventh plea, finding that the allegation in the first part of the second breach, as to the arrest of Bacon under the void writ, was true, cannot be inconsistent (looking at the verdict and the other parts of the record only) with a finding for the defendant on the general issue to the whole of the second breach, denying in effect the whole cause of action under the second breach, compounded of the negligent arrest under the void writ, and the consequent non-arrest under the plaintiffs' writ.

I answer your Lordships' last question, therefore, by saying, that in my opinion there is no inconsistency in the findings of the jury referred to in that question.

MR. BARON MARTIN. — My Lords, the material facts set out in the bill of exceptions are these : [His Lordship stated them.] If the questions upon which the correctness of this ruling depends were new, and there had been no decisions or dicta of Judges bearing upon them, I cannot think that there would be much difficulty in arriving at the true legal conclusion. The arrest of Bacon made by Swayne under the warrant in the name of Arambura was illegal, there being no legal authority for it ; but at this time the sheriff had had delivered to him, and had then in his possession, a legal writ of *ca. sa.* at the suit of the present plaintiff ; by which he was commanded and authorised, and it was his duty to arrest Bacon. In the absence of authority, I should have thought

that when Bacon came into the direct custody of * the *491 sheriff in his prison, or when the sheriff actually, and in fact, acted upon this *ca. sa.*, from thenceforth Bacon was in lawful imprisonment under that writ, at the suit of the present plaintiff. Up to the time of Bacon being placed in the prison of the sheriff, or of the sheriff actually acting upon the plaintiff's writ, I think the imprisonment was illegal, and that the sheriff is liable to an action for it, and for the illegal arrest; but after that time I should have thought the imprisonment lawful, and that the sheriff could justify under the plaintiff's writ. The supposed answer is, that to hold this, would allow the sheriff to avail himself of his own wrong; and if the sheriff was alone concerned, it might be a satisfactory one; but the sheriff is not the sole person concerned; on the contrary, there is another person, viz. the plaintiff in the execution, who has a very much greater concern and interest; he has done no wrong, he had placed his writ in the hands of the sheriff, not by any voluntary choice or selection of his own, as to the person or agent whom he desired to execute it, but by compulsion of law, which forced him so to do. As regards him, Bacon is where he ought to be, in the custody of the sheriff, in order by the duress of imprisonment to coerce him to pay his debt, and it seems unreasonable that the plaintiff should be deprived of the advantage of the custody of his debtor's body, because the sheriff in another matter with which the plaintiff has no concern, has been guilty of an unlawful act, and for which he is in law liable to make compensation in damages.

But there are various cases and opinions of Judges upon the subject, and I have given them the best consideration in my power. They have already been referred to in the judgment of my brother Bramwell, and I need not repeat them, but in my opinion the cases of *Thurland*,¹ and * *Howson v. Walker*,² decided * 492 before *Barratt v. Price*,³ cannot be reconciled with the cases of *Pearson v. Yewens*,⁴ and *Collins v. Yewens*,⁵ decided afterwards. As to the decision itself, in *Barratt v. Price*, upon the supposed authority of which the two latter cases were decided, I think its correctness depends upon whether or not the Court arrived at a true conclusion as to a matter of fact. The son of the officer who

¹ Dyer, 241 b, 244 b.

² 2 W. Bl. 823.

³ 9 Bing. 566.

⁴ 5 Bing. N. C. 489.

⁵ 10 A. & E. 570.

had the warrant having met the defendant seized him, and delivered him to a policeman upon a fictitious charge of felony; he then went to his father, who came with the warrant, and arrested the defendant. If the Court arrived at a correct conclusion as to the fact that under the circumstances the officer was mixed up with his son in the original taking, I think the decision was right, and for this reason, that if the officer had had warrants upon all the writs then in the sheriff's office, the arrest would have been illegal as to all; and this seems to me to afford the correct rule, viz. if the circumstances be such that the defendant would be entitled to his discharge, notwithstanding that the officer had a warrant issued to him on the plaintiff's writ in his possession at the time of the actual arrest, then I think that the defendant is entitled to be discharged, notwithstanding that the sheriff seeks to act upon the writ for the first time at a period subsequent to the actual arrest. But, on the other hand, if the circumstances be such that if the officer had had, at the time of the arrest, a warrant upon the writ in respect of which the discharge is sought, the arrest would have been lawful; then I think the sheriff is legally bound to detain the defendant upon the lawful writ, notwithstanding that the original arrest was made illegally and without
 * 493 lawful authority * and the defendant entitled to be discharged had there been no other writ.

In the case of *Robinson v. Yewens*,¹ Baron Parke says: "The old rule was, that if the sheriff had several writs against the same party, and arrested him on one of them, he is considered in custody on all"; but his Lordship adds: "The case of *Barratt v. Price* introduced the very proper and reasonable distinction, that in order that this consequence should follow, the first arrest must not have been illegal by the wrongful act of the sheriff." If this was meant to express the wrongful act of the sheriff himself, I concur; but if it was meant the wrongful act of the sheriff by reason of the act of his bailiff, acting on a warrant on one writ, there being another writ in the office on which the sheriff afterwards acted, I cannot concur. The cases of *Pearson v. Yewens* and *Collins v. Yewens* were decided upon the authority of *Barratt v. Price*; but they go beyond the judgment, although probably not beyond some expressions used by Chief Justice Tindal in delivering it; they, however, are at variance with *Thurland's Case*, and

¹ 5 M. & W. 152.

Howson v. Walker, which, in my opinion, are the more correct legal decisions.

The error (as I consider it) in these cases appears to me to have arisen from the improper application of two well-known rules of law, one, that the sheriff is responsible for the acts of the bailiff done in the execution of writs. This rule is founded upon grounds of public policy, in order to protect the subject from oppression, and give him secure redress against any illegal act done under colour of legal process: *Woods v. Finnis*.¹ But this rule has reference to the sheriff alone, and does not affect the parties to the writ. The other is, that when the sheriff arrests in one * action it operates as an arrest in all actions in which * 494 the sheriff holds writs against him at the time. I think this rule does not, indeed cannot, extend to an arrest by a bailiff acting under a warrant in a particular suit, and that before the rule operates, some act must be done by the sheriff himself, or by some authority which represents him, for all purposes connected with the writs in his hands. The arrest of Yewens was attended with a very remarkable circumstance. There were writs against him from all the Courts in the hands of the sheriff at the time of the arrest, and the Court of Exchequer refused to discharge him as against the Exchequer writs, upon the fact being deposed to by affidavit that there was no collusion between the sheriff and the person who made the arrest. Any one acquainted with the practice of the office of the sheriff of Middlesex would know that such collusion could scarcely exist, as the practice of that office is not to interfere directly with arrests, but to leave the matter entirely with the officer: *Robinson v. Yewens*.²

The cases being thus conflicting, I think I am at liberty to adopt the rule which seems to me the most correct in point of law, and in my opinion it is that which I have already expressed.

This rule would provide for all cases of arrest of privileged persons, and such cases as might occur similar to that of *Barratt v. Price*, and has the advantage of being plain and simple, and of easy application, and not likely to lead to such a result as occurred upon the arrest of Yewens, viz. that the Courts of Queen's Bench and Common Pleas discharged him, while the Court of Exchequer detained him in custody, the original arrest being one and the same act as regarded all.

¹ 7 Exch. 363.

² 5 M. & W. 149.

* 495 * It may be urged that if my view of the law be correct, the consequence would follow that the arrest of Bacon by Swayne could be justified by the sheriff, upon the well-known principle, that if a man has two supposed authorities to do an act, one of which is bad in law and the other good, and he does the act, professing to act upon the bad one, he may nevertheless justify under the good one, and successfully defend himself; but I think this is not so. Swayne clearly would have no justification, and the sheriff is, by the well-known legal rule before mentioned, upon grounds of public policy, liable for the unlawful act of his bailiff, and in my opinion, so long as Bacon was merely in the custody of Swayne, and until he was either placed in the sheriff's prison, or the plaintiff's writ actually put in force against him, the latter writ was not in operation at all; and in the event of the sheriff attempting to justify under it, his plea would be effectually answered by a new assignment, to which he could give no valid answer.

I am therefore of opinion that the first exception is well founded. As to the second exception, I have very great doubt whether there was any evidence of neglect of duty as against the plaintiff; but it is not necessary for me to give an opinion upon it. As to the third, it seems scarcely relevant to the case.

My answers to the questions proposed by your Lordships are, first, that Bacon was not in the custody of the sheriff under the writ of *ca. sa.* at the suit of the defendants in error, upon the arrest at the suit of Arambura, nor until some act was done on behalf of the sheriff under that writ. Second, that he was in lawful custody at the suit of the defendants in error when he was brought by the sheriff before Mr. Justice Coltman. Third, I am rather inclined to think that there was no evidence to go to
* 496 the jury; but * this is an extremely difficult question to answer upon such evidence as is set out in this bill of exceptions. Fourth and fifth, I agree with the opinion of those who have preceded me.

MR. JUSTICE WILLIAMS. — In answer to your Lordships' first and second questions, I have to state my opinion that Anthony Bacon was not in the lawful custody of the plaintiffs in error, either when their officer took him at the suit of Arambura, or when the plaintiffs in error afterwards brought him in custody before Mr. Justice Coltman.

I have found it impossible to regard the facts of this case otherwise than as falling within the rule of law laid down and acted on in *Barratt v. Price*,¹ and therefore in my judgment the answer to these two questions of your Lordships must depend entirely on the inquiry, whether that case ought to be overruled; and I am of opinion that it ought not.

The rule there laid down is; that though, generally speaking, when the sheriff arrests the defendant in one action, it operates virtually as an arrest in all the actions in which the sheriff holds writs against him at the time, yet where the sheriff has, by his own act, illegally arrested the defendant, such an arrest, being a false imprisonment, cannot operate as an arrest under any writs lodged with the sheriff. In other words, if the sheriff has wrongfully imprisoned the defendant in one suit, he shall not make such custody a means of taking him or detaining him in any other.

The authority of this case, which was decided after full * consideration, was afterwards recognised by all the three * 497 Courts of Westminster Hall, in *Pearson v. Yewens*,² *Robinson v. Yewens*,³ and *Collins v. Yewens*.⁴ It is true, as to these cases, that the Judges of the Exchequer differed from the two other Courts on the construction which ought to be put upon the facts brought before them; but the Courts were unanimous in regarding *Barratt v. Price* as having established the true rule to be applied to the facts when ascertained. In the subsequent case of *Barrack v. Newton*,⁵ the doctrine of *Barratt v. Price* was distinctly recognised as an established rule of law by every member of the Court; and it should be added, that in none of these cases was the soundness of that doctrine in any degree disputed or doubted, either at the bar or on the bench. On the contrary, in *Robinson v. Yewens*, Mr. Baron Parke speaks of "the very proper and reasonable distinction introduced by *Barratt v. Price*."

A case thus deliberately decided, and thus fully recognised and acted on, it would surely be mischievous to overrule, unless it can be shown to have been founded on some wrong or unjust or hurtful principle, or that it is inconsistent with some better authority.

The principle of the rule may perhaps be stated to be, that if a first arrest be a false imprisonment by the wrongful act of the

¹ 9 Bing. 566.

² 5 Bing. N. C. 489.

³ 5 M. & W. 151.

⁴ 10 A. & E. 570.

⁵ 1 Q. B. 525.

sheriff himself, no subsequent conduct or act of his can legalize the continuance by him of that imprisonment. It has been argued that such a doctrine is unjust both to the sheriff and to the plaintiffs in the other actions, who have lodged writs of execution in his hands, and thereby gained a right to have the body of their debtor arrested.

As to the sheriff, it must be borne in mind that the rule is only applicable when, as in the present case, the bailiff * 498 * who makes the illegal arrest acts under such circumstances that his conduct can be considered as the conduct of the sheriff, and his custody as the custody of the sheriff himself. This can rarely happen; but when it does, why should it be deemed unjust that the sheriff should not be allowed to take advantage of his own misconduct for his own purposes? If the sheriff of Surrey, having writs of *ca. sa.* against a defendant, and being desirous of taking him, but unable to do so because he is living in Kent, goes out of his own bailiwick into the latter county, and lawlessly makes the arrest there, and then brings his prisoner into Surrey, is it unjust to him that the law says, "You shall not continue the custody of the prisoner you wrongfully took, and entitle yourself or your bailiffs to fees, whatever writs you may have which authorise you to arrest or detain him in the county into which you have illegally brought him"? The inducement to sheriff's officers to arrest unlawfully, for the purposes of earning their fees by detaining on other writs, has been much diminished since the poundage on writs of *ca. sa.* was abolished by the Statute 5 & 6 Vict. c. 98, but that circumstance affords no good reason for overruling the established doctrines of law as to the consequences of such illegality.

With respect to the other execution creditors, if the sheriff has not had it in his power legally to arrest the debtor, they have no just ground of complaint. If he has had it in his power, and has negligently disabled himself by means of his illegal arrest, then the execution creditors have a remedy against the sheriff, and will probably be no losers by substituting his liability for that of their debtor. And it may be observed that the sheriff can, in every case, by his misconduct or negligence, at the peril of his own responsibility, annihilate the right of the execution creditors to take the body of the debtor, by refusing or neglecting to act on the writs of execution.

* The rule laid down in *Barratt v. Price*, it may be re- * 499
marked, in no way interferes with the doctrine, that the
sheriff may (and indeed must, at his peril, if he has an oppor-
tunity) execute a *ca. sa.* on the body of the debtor, although he
may be already in illegal custody, and although the illegal custody
be the means of enabling the arrest, provided it has not been
brought about by the illegal act of the sheriff himself.

Nor does it interfere with the doctrine that a man acting under
legal authority is not confined in his justification to the authority
under which he has professed to act at the time when he acted,
but may resort to any other authority which justified his proceed-
ing. For instance, in the present case, if the officer of the plain-
tiffs in error had been armed with a warrant on the writ at the
suit of the defendants in error at the time he took Anthony Bacon,
the plaintiffs in error might well have pleaded that writ in justifi-
cation, if Bacon had sued them for arresting him, notwithstanding
their officer professed at the time to be acting on Arambura's writ.
But if such an action had been brought and such a plea pleaded,
it would have been a good replication to plead (as the fact really
was) that they had arrested him by the hands of a bailiff who
had no warrant on the writ at the suit of the defendants in error.
It was only to prove the validity of such a replication, and the il-
legality of an arrest by a bailiff without a proper warrant, that the
*Countess of Rutland's Case*¹ was cited in Lord Truro's judgment
in the present case in the Exchequer Chamber, though, owing
probably to the abruptness with which it is there mentioned, it has
been sometimes regarded as if it had been cited generally in sup-
port of the doctrine in *Barratt v. Price*.

* As to the authorities supposed to conflict with that doc- * 500
trine, the case mainly relied on has been *Thurland's Case*.²
There certainly the illegal arrest was the sheriff's own act. He
afterwards procured a *ca. sa.* to warrant it, and brought the
prisoner into Court, having returned *cepi corpus* to the writ; and
the Court fined the sheriff for his misconduct, but committed the
prisoner to the Fleet (there to remain until, &c.), because the
plaintiff was innocent. It was observed on this case, in the argu-
ment before this House, that the sheriff appears by the report, ac-
cording to the practice of that day, to have actually brought the
body into Court pursuant to the exigency of the writ, and there

¹ 6 Rep. 52 b, 54 a.

² Dyer, 244 b.

does not operate as an arrest in any other action, and therefore the sheriff, after such an unlawful arrest, cannot arrest or detain in any other action till the defendant has been set free from the unlawful arrest, and has been found again, and arrested lawfully.

I submit that each of the three propositions preceding the conclusion, though true in one sense, is untrue in the sense intended by the Court; that the conclusion does not follow from these propositions in whatever sense they are taken; and that the rule laid down in this case for the first time is inconsistent with sound principles relating to arrest by the sheriff.

Before examining the judgment in detail, it is worth while to consider the wider question, when does an unlawful arrest render a custody unlawful which would otherwise be lawful, and the principles which have been settled, and ought to govern in answering this question? If we suppose that to a *habeas corpus* there is a return of custody under a writ, and a reply of an unlawful arrest, this reply may show unlawfulness either in respect of the writ being void, or of a trespass in the execution of it; and in the case of a trespass in the execution of it, the reply may be of a trespass by a stranger, or by the plaintiff, or by the bailiff, or by the sheriff. And this reply may be made to a return of custody under more writs than one, and those writs may be at the suit of the same or different plaintiffs.

Now what are the principles that ought to govern in answering the question so raised, taking into account the rights and duties of the sheriff, and of the defendants, and of the several plaintiffs, one of whom may be a party to a wrong, and another no party thereto? It would be reasonable that the wrongdoer should *504 make compensation for his *wrong, and should take no advantage to himself therefrom; that the sufferer of the wrong should be entitled to compensation from the wrongdoer, and then be amenable to the law in respect of the rights of others against himself, to the same extent as if he had suffered no wrong; that the rights of plaintiffs who did not participate in the wrong should not be affected thereby; that as the sheriff is the distinct and separate agent of each party from whom he holds a writ, and the bailiff the distinct and separate agent of each party for whom he holds a warrant, if the sheriff or bailiff in their agency for one of the parties commits a wrong, they must compensate the sufferer,

and the plaintiff, their principal in that matter, can take no advantage therefrom; but other plaintiffs for whom they were neither directly nor indirectly acting in committing the wrong should not take detriment, nor be deprived of any right thereby. I submit that all the decided cases before *Barratt v. Price* are in accordance with these principles; that case having first decided that the defendant arrested by trespass of a bailiff is entitled not only to compensation, and to his discharge in the suit in which the trespass was committed, but also to his discharge in all other suits by other plaintiffs whose writs have been or should be in the hands of the sheriff before he should have been set free, and that thus the rights of plaintiffs not participant in the wrong should be suspended; and that the sheriff should be incapacitated as to their writs by reason of a trespass of a bailiff acting for a party a stranger to them.

The class of cases that I would first refer to in support of this view of the law consists of those relating to false imprisonment by a stranger to the suit, and I would beg to draw particular attention to that portion of them relating to false imprisonments for the purpose of procuring a lawful arrest thereby.

* If the reply to a return of custody under a writ shows * 505 that the custody began during an imprisonment by trespass, it does not thereby show that the custody is unlawful. To produce that effect, it must go on to show that the plaintiff or the sheriff participated in the trespass. If this is not made out, it matters not that the imprisonment was effected for the purpose of procuring the arrest, and that the bailiff knew of the false imprisonment when he went to execute the writ, and was enabled to execute it by reason of the trespass. Indeed, as the sheriff in one sense must arrest when he may, if he was informed of a false imprisonment, and did not take advantage of it to effect a caption, he would be liable to an action at the suit of the plaintiff for the omission.

Thus, when after judgment, and before *capias* issued, a friend (called in the report an agent) of the plaintiff, and the sheriff (probably a sworn bailiff) imprisoned the defendant by trespass, for the purpose of arresting him under the judgment, and then procured a *capias*, and arrested him under it, it was held, after great consideration, to be lawful custody.

The plaintiff was found clear of all participation in the wrong. The sheriff, as his agent, after the writ issued, only did his duty in

taking the defendant under the writ, and although he and the friend of the plaintiff trespassed, yet this was trespass by strangers to the action, to the writ, and to the plaintiff, and had no operation upon the plaintiff's right under the writ; and although the defendant was wronged, his compensation was to be made by the wrongdoers, and not at the cost of the plaintiff, who was clear of wrong: *Thurland's Case*.¹

I submit that the Judges who decided this case laid
* 506 * down the principles for discriminating whether custody is made lawful or unlawful in respect of a preceding trespass, with masterly precision and perspicacity.

So when Herne, a stranger, imprisoned by trespass, intending to procure a lawful arrest at Howson's suit, and Howson's attorney hearing of it, sent for the bailiff, and so perhaps participated in the imprisonment till he came, and the bailiff bringing Howson's warrant, and also a writ in *Crowden v. Walker*, took Walker to prison; it was held lawful custody in Crowden's suit, although Walker was taken out of imprisonment by trespass, and although the bailiff was informed of the trespass before he arrested. The custody as to Howson was held unlawful, but as no cause was shown, and there was no discussion, the ground is not stated; probably it was because the plaintiff by his attorney became a party to the trespass before the arrest: *Crowden v. Walker*, *Howson v. Walker*.²

So where Sloman imprisoned by trespass, by taking Yewens to the lock-up house under a warrant of the late sheriff, at the suit of M'Claren, and then produced a valid warrant at the suit of Robinson, and held the defendant thereunder in the same lock-up, it was held to be lawful custody. For although Sloman, a sworn bailiff, trespassed in taking under the void warrant at the suit of M'Claren, still both Robinson the plaintiff and the then sheriff were no parties to that imprisonment by trespass, and therefore it did not affect the custody under Robinson's writ: *Robinson v. Yewens*.³ This case is worthy of particular attention, for it revised, and, as I submit, corrected two decisions on the same arrest of Yewens by Sloman in the Queen's Bench and Common Pleas, to be hereafter mentioned.

* 507 * The cases that follow are examples of lawful arrests during imprisonment by trespass, but where the imprison-

¹ Dyer, 244 b.

² 5 M. & W. 149.

³ 2 W. Bl. 823.

ment was not intended for the arrest; thus, where the defendant was arrested by trespass on Sunday, at the suit of a corporation, and while in custody a *ca. sa.* was lodged by a plaintiff not participant in the trespass of the corporation, the custody at the suit of the plaintiff was held to be lawful, though it began in an unlawful custody at the suit of the corporation: *Eggington's Case*.¹

So where defendant was arrested under a writ void for irregularity, and was held in custody under that and under a subsequent valid writ for another party, it was held that the false imprisonment under the first writ did not make the custody under the second writ unlawful. The Court says, false imprisonment does not make the custody beginning therewith unlawful, unless the sheriff or plaintiff participates therein: *Ex parte Cogg*.²

Where defendant was arrested by trespass on a Sunday, and arrested under a *ca. sa.* while so falsely imprisoned on Monday, it was held lawful custody, there being no collusion: *Jacobs v. Jacobs*.³

The second class of cases I would refer to in support of the principles above mentioned consists of those where the plaintiff has been party to the trespass in the arrest. Whether the trespass is by wilful wrong, or by reason of the writ being void, not only is the custody in the suit in which the trespass was committed unlawful, but also if the same plaintiff has lodged another writ against the same defendant, the custody under that writ is also void. If the defendant has not been discharged from the custody begun by the plaintiff's trespass, the plaintiff is held to be a wrongdoer in creating the custody, and is therefore precluded * from taking any advantage from his wrong, that * 508 is, he is required to restore to freedom, as far as he is concerned, the party whom he had imprisoned by wrong.

Thus, where plaintiff was a party to a false criminal charge and arrest on Sunday, for the purpose of arresting in a civil cause on Monday, the custody at his suit was illegal: *Wells v. Gurney*.⁴ And where the plaintiff met the defendant, and by trespass forced him to his chambers, and sent for the bailiff with a writ, the custody under that writ was illegal: *Birch v. Prodder*.⁵

So where defendant was taken on an irregular attachment from Chancery, and attempted to be detained by a *capias utlagatum* at

¹ 2 Ellis & B. 717.

² 6 Dowl. P. C. 461.

³ 3 Dowl. P. C. 675.

⁴ 8 B. & C. 769.

⁵ 1 New R. 135.

the suit of the same plaintiff, this was held to be unlawful custody, as under the second writ the plaintiff was taking advantage of his own wrong: *Hall v. Hawkins*.¹ So when defendants were arrested by trespass by revenue officers for breaches of revenue laws, and were detained under writs of *capias* for other breaches of revenue laws, it was held unlawful custody in each case, as being substantially at the suit of the same plaintiff, being a matter of revenue; the reason is not explicitly stated in each case, but they seem to stand on this ground: *Attorney-General v. Carl Cass*;² *The Same v. Golder*.³

So where a corporation committed for not giving up 'corporation books, and arrested by trespass, and afterwards lodged another warrant for not delivering up some other books belonging to the same body in another corporate capacity, held unlawful custody, the second warrant being substantially between same parties as the first: *Eggington's Case*.⁴

So where plaintiff imprisoned on Sunday, and arrested * 509 * on Monday, *Lyford v. Tyrrel*;⁵ and where plaintiff arrested and then lodged the writ with the sheriff, the custody in each case was unlawful: *Barlow v. Hall*.⁶

The cases of the third class are those where the custody at the suit of one plaintiff under whose writ the arrest was made is unlawful by reason of irregularity or other defect in a writ which is *ex facie* valid, and the defendant is detained under valid writs at the suit of other plaintiffs. Under these circumstances the custody at the suit of the last-mentioned plaintiffs is lawful, though it originated in a custody which was a trespass.

For the trespass the plaintiff in default must compensate, and with that compensation the defendant is as amenable to the law in respect of other plaintiffs as if no wrong had been committed. On this point it is enough to cite the case of *Barrack v. Newton*,⁷ where it was fully considered and distinctly laid down.

This decision follows legitimately from the two principles before mentioned; the custody is unlawful as to the plaintiff, who being a trespasser cannot take advantage of his own wrong; lawful as to other plaintiffs, in respect of whose writs the false imprisonment

¹ 4 M. & W. 590.

² 11 Price, 345.

³ 12 Price, 335.

⁴ 2 Ellis & B. 717.

⁵ 1 Anstr. 85.

⁶ 2 Anstr. 461.

⁷ 1 Q. B. 525.

of the defendant was no impediment, they not being parties to it. It is true the Court confines its judgment to a void writ, which is valid *ex facie*, so as to prevent the sheriff from being a wrongdoer ; and the Court of Queen's Bench thus avoided a conflict with the decision of the Common Pleas in *Barratt v. Price*. But, except for that purpose, it is not easy to see the reason for holding, in case of arrest by trespass at the suit of one plaintiff, that the custody of other plaintiffs is lawful, where the first plaintiff is alone liable for damages for the trespass without the sheriff; but in case of arrest by trespass where * the sheriff is either * 510 alone or jointly with the plaintiff liable for damages, there the custody at the suit of other plaintiffs is unlawful; it is not easy to see why the defendant's right of recourse to the sheriff for damages should affect the lawfulness of the custody at the suit of the plaintiffs unconnected with the trespass.

I would now come to the judgment in *Barratt v. Price*, and would beg to draw attention to the positions in it leading to the conclusion. The first is, that the act of the bailiff is the act of the sheriff. This is true if confined to the action in which the warrant to the bailiff is granted; untrue if it is extended to any other action. The trespass of the bailiff in *Nokes v. Price* was the trespass of the sheriff in that action, but no further, and I venture to submit that there was confusion leading to mistake, if the Court supposed that the illegal act of the bailiff in that action affected with illegality in any degree the act of the sheriff in *Barratt v. Price*. The sheriff is the agent of all the parties leaving writs to be executed; the bailiff is the agent of that party only in whose suit he receives a warrant, and the illegal act of the bailiff for *Nokes* affects *Nokes's* suit, but not *Barratt's*, and it is difficult to see why it affects the sheriff's rights and duties towards *Barratt* more than it affects *Barratt* himself. The illegal act of the bailiff without authority from the sheriff is made the act of the sheriff, contrary to the general law of principal and agent, for the sake of securing a responsible recourse for indemnity in case of any wrong done in the execution of process. It is confined entirely to the act of the bailiff in executing process, and to civil responsibility in respect of that act; the reason for this responsibility of the sheriff, and the extent and limit of it, are stated in *Woods v. Finnis*,¹

* where the bailiff received the debt and costs from the * 511

¹ 7 Exch. 363.

defendant, and the sheriff was held not responsible, because this act was beyond the execution of the *capias*.

The limited sense in which the act of the bailiff is the act of the sheriff will further appear if the case of a special bailiff nominated by the plaintiff be supposed. In that case, as between the plaintiff and the sheriff, he is not the agent of the sheriff, but of the plaintiff alone, and the sheriff is not responsible for his act, but as between the defendant and the sheriff he is still the agent of the sheriff; in other words, the defendant has the same right here to treat the sheriff as his resort for damages as he would have in case of a sworn bailiff. If Nokes had nominated a special bailiff, Price would have had a right to say that his act was the act of the sheriff, and it would be true as to Price, but not in any other sense.

The second proposition in the judgment is, "that a lawful arrest under one writ operates as an arrest under all writs held by the sheriff against the same defendant, for it would be an idle ceremony *actum agere*." This is true in the sense that after a caption under one writ, changing freedom into imprisonment, no other caption is necessary to bring the party into custody under other writs. Caption or arrest, in the sense of changing freedom into imprisonment, cannot possibly be repeated till the imprisonment has been changed back into freedom again. But it is not true in the sense that an arrest under one writ operates by law as an arrest under any other writ. Still less is it true that it affects the powers of the sheriff in respect of other writs. If a bailiff with one warrant arrests, the custody is confined to that warrant. If he has several warrants, the arrest is under all that he holds; and after the arrest, and before notice to the sheriff, the defendant is not in custody under other writs lying in the sheriff's

*512 hands. For instance, if he * is rescued from the bailiff immediately after the arrest, it seems that those plaintiffs only can sue the rescuers who had warrants in the bailiff's hands: *Hodges v. Marks*.¹ When the prisoner is brought into custody of the sheriff, he is immediately in custody under all the writs which are known by the sheriff to apply to him. He is in actual custody, and the sheriff has lawful cause, and knows of it; and after search, he is further in custody under all other writs which may be then found and made out to apply to that defendant. It is an operation of fact, not of law. If there are several writs against

¹ Cro. Jac. 485.

the same name, it is a question of identity in respect of each writ, and as the identity is made out, the custody attaches.

The third position of the judgment is, "That an unlawful arrest in one action, being a false imprisonment by the sheriff, and no arrest in that action, does not operate as an arrest in any other action." This also, I submit, though true in one sense, is not true in the sense in which it was intended. The point for decision was, the lawfulness of the custody in Barratt's suit. The position is, that the void arrest in Nokes's suit was no arrest, and therefore there was no arrest in Barratt's suit; and therefore the custody in Barratt's suit was unlawful. Unless it was intended in that sense, it was irrelevant. If it was so intended, it involved the notion that the lawfulness of custody in a suit is to be tested by reference to the lawfulness of an actual or virtual arrest in that suit; which I submit is a mistake. Lawful custody is created anew as often as a lawful cause of holding comes to a sheriff who has the party already in confinement. If he is confined in the lock-up house by trespass, and a *capias* reaches the sheriff, he is at once in custody, as is shown in *Thurland's Case*, and in *Robinson v. Yewens*. Here the writ has come to the defendant in * 513 the sheriff's prison, and if he is imprisoned by trespass in another place, the sheriff, taking him with a writ to his own prison, has him in lawful custody; and it is an error to test lawfulness of custody by lawfulness of arrest, if arrest means the act by which freedom is changed into imprisonment. This is shown both in the cases before cited and those which follow. Thus, where a defendant was in custody of the sheriff on a charge of felony, and a *capias* was lodged: *Ward v. Brumfit*.¹ And where he was in custody under a revenue conviction, and a *capias* was lodged, not intended for execution before removal by *habeas corpus*: *Owen v. Owen*.² And where the defendant was in the lock-up house of a bailiff, and a *capias* was left, which the bailiff refused to execute: *Frost's Case*.³ And where a defendant was in custody, and a *capias* was left to be returned *non inventus*: *Forsyth v. Marriott*.⁴ And where a *capias* had been left to be returned *non inventus*, and defendant came to the office and claimed to be in custody to relieve his bail: *Magner v. Monger*.⁵ And where a discharge for a

¹ 2 M. & S. 238.

² 2 B. & Ad. 805.

³ 5 Rep. 89.

⁴ 1 New R. 251.

⁵ 4 Q. B. 817.

defendant from the plaintiff arrived at the prison on Saturday, and was sent to the under-sheriff, who returned it on Monday, and on Sunday another *capias* arrived: *Samuel v. Buller*.¹ And where a *capias* had been lodged and a discharge given by the plaintiff to the defendant, but without notice to the sheriff, and he arrested the defendant by this mistake, and found in his office a *capias* against the defendant, with direction not to be executed unless in custody, though the custody was by mistake: *Arundel v. Chitty*.²

In all these cases, it was held that a lawful custody was *514 created. Whenever actual custody * is combined with a lawful cause, it is lawful custody, unless one of the exceptions before mentioned applies. In many of these cases the custody is a duty cast on the sheriff against his will, and against the will of the party leaving the writ. Each custody is as separate and distinct from any other as if a prison wall was added, or a separate chain for fastening up was left when a new writ arrived. I cite these cases to show that the reasoning is not legal if the Court supposed that the custody of Price at the suit of Barratt was unlawful because the arrest by which he was taken from freedom to imprisonment in Nokes's suit was unlawful.

I submit that these three propositions, taking them to be reasoning for a final cause, that is, for adapting means to an end, lead to a conclusion the reverse of that pronounced by the Court. The judgment is, that as the act of the bailiff is the act of the sheriff, a lawful arrest of Price at the suit of Nokes by the bailiff would be a lawful arrest of Price at the suit of Barratt by the sheriff, for after one lawful arrest, another would be an idle ceremony. But if the arrest at the suit of Nokes is unlawful, and no arrest, an arrest at the suit of Barrett, instead of being an idle ceremony, would be an essential act; and the conclusion to be expected, if sheriffs are instituted for the purpose, among other things, that judgments should be executed, would be that he should be directed to arrest at the suit of Barratt; but the Court decides the reverse, holding that he is, by reason of the need for arresting, incapacitated from arresting at the suit of any one. This reasoning is the only ground assigned for the judgment. It is not supported by any consideration of expediency or any principle of law, nor is it supported by a single authority. In *Hooper v. Lane*,³ Chief Justice Wilde

*515 cites the *Countess of Rutland's Case* (6 Rep. 52 b) as sup-

¹ 1 Exch. 439.

² 1 Dowl. P. C. 499.

³ 10 Q. B. 559.

porting it. But it is utterly irrelevant. It was an information in the Star Chamber against the plaintiff and the serjeants-at-mace, i. e. the bailiffs, for a conspiracy to arrest by trespass, in breach of privilege of peerage. It appeared that the sheriff of London had a *ca. sa.* against the Countess, and the bailiffs fearing she would be rescued from the sheriff, and thinking the power of the city safer, conspired with the plaintiff to levy a false plaint in the City Court; then the serjeants-at-mace arrested her thereon, and took her to the Compter, the city jail, and then the sheriff arrested her and took her to the county jail, and she paid the debt, and was released. After a hearing on this information, it was held that the defendants should be punished. This is the whole; nothing is said either of the sheriff or of the lawfulness of his arrest, or of his returning the levy. Even if his custody had been held unlawful, on the ground that he had been a party to the conspiracy, it would have signified nothing to the matter now in hand; but the point is not adverted to further than that, as a general proposition, it is said a *capias* against a peeress would justify the sheriff in arresting, although as peeress she would be entitled to be discharged. This case is, therefore, no authority for *Barratt v. Price*.

In *Collins v. Yewens*,¹ where Yewens was arrested by Sloman, under a void warrant in one suit, and held by him under a valid warrant in another suit; and in *Richards v. Yewens*,² where the defendant, after the arrest by Sloman before mentioned, was held under another warrant to another officer, each custody was held unlawful. The Court says that an imprisonment by trespass does not make an arrest unlawful, unless the sheriff or the plaintiff was a party to it. It also says that the arrest by Sloman was a * trespass, not because the sheriff was a party to it before- * 516 hand, but because, hearing of the imprisonment, he issued a warrant in another suit to Sloman to arrest. The Court held that the custody in each suit was unlawful; and it seems to consider the danger lest a sworn bailiff might imprison by trespass without warrant, in order that a bailiff with a warrant might take into lawful custody, as some ground for the judgment. In *Pearson v. Yewens*,³ in respect of the same circumstances, the Court held the custody unlawful on the ground of implied collusion in the sheriff, by adopting the first trespass in making the warrant for the

¹ 10 A. & E. 570.

² 5 Bing. N. C. 489.

³ Referred to in *Collins v. Yewens*, 10 A. & E. 574.

second arrest. But after both of these cases, the lawfulness of the same custody under the same circumstances was affirmed in *Robinson v. Yewens*,¹ on the ground that as Sloman imprisoned by trespass without collusion with the sheriff, therefore the custody of the sheriff under the second warrant granted to Sloman was lawful. If *Collins v. Yewens* and *Pearson v. Yewens* are cited as supporting *Barratt v. Price*, each Court, probably, in coming to the judgment, was swayed by *Barratt v. Price*. But I submit that the judgment of each Court was revised by the Court of Exchequer in *Robinson v. Yewens*; and I submit that the judgments of those two Courts sanction a notion that the sheriff, taking into custody a party imprisoned by trespass without previous collusion, may be found guilty of implied collusion *ex post facto* from adopting a trespass, and in so doing they sanction a mistake. For I submit, on the authorities before cited, that if a stranger, knowing that writs were out against a defendant, were to seize him, and to bring him to the sheriff's office, the sheriff would be bound to take him into custody; and if Sloman had told the sheriff of his trespass upon Yewens, the sheriff would have been liable to an action by Robinson, if he had not immediately caused the writ to be executed. And if he had knowingly chosen Sloman for the purpose, according to *Thurland's Case*, he would have been justified in doing so. It may be observed, in passing, that on this reasoning the original order of a Judge for a discharge of Price from the arrest at the suit of Nokes was a mistake, because the bailiff took him into lawful custody, though he was falsely imprisoned, and the subsequent misconduct of the bailiff could not make a lawful arrest unlawful.

In some cases *Barratt v. Price* has been cited with approval, but only for that part of the decision which is undisputed; and though it may have been acted upon in practice, I do not find any reported case in which that fact is stated, except as to Yewens in two Courts, and as to Bacon in this case.

It was cited in *Eggington's Case*, who was imprisoned by trespass of the party, not of the sheriff; but the result of that case tends to confirm what appears to me to be the true principle of law, namely, that a custody under a writ is not unlawful by reason of a previous imprisonment by trespass, unless the sheriff in the execution of that writ was a party to the trespass.

¹ 5 M. & W. 149.

Another class of cases has been referred to as supporting *Barratt v. Price*, but I submit that they are entirely irrelevant, viz. the cases of arrests during a privilege. In these, the right to a discharge from the first arrest is a right to a discharge from all subsequent detainers, from the nature of the privilege, which is protection from all arrests. The party is privileged either for life as a peer, or during the session of Parliament as a member, or *eundo morando* and *redeundo* as a suitor. In these cases the meaning of the privilege is in exemption from all custody during the privilege.

* Thus where a bankrupt was arrested returning from * 518 examination, he was held to be privileged, and discharged from the suit in which the arrest was, and from all other suits. The language of Lord Loughborough and Lord Eldon, declaring that an arrest in one suit is an arrest in all, and if the first arrest is unlawful, all are unlawful, and a discharge in one is a discharge in all, must be understood with reference to the arrests unlawful on account of privilege, and to discharges from such arrests on account of privilege, which was the matter then in judgment before them: *Ex parte Hawkins*; ¹ *Ex parte Ross*.²

So where Newton was arrested when privileged as a barrister, the discharge in the suit of the arrest was a ground for discharge in all suits in which writs had been lodged, from the nature of the privilege.

But the same defendant at another time, on another application, being discharged in the suit of arrest, for a defect in the writ, was held to be in lawful custody as to all other writs, for the illegality in one suit did not affect other suits, though privilege affected all: *Barrack v. Newton*.³ An arrest during privilege is not a trespass, and the party can only enforce his privilege by applying for a discharge. In *The Countess of Rutland's Case*⁴ it was said that a *capias* against a peeress might be lawfully executed by the sheriff, for as the Court issued the writ, the sheriff, as its officer, ought to obey it. And in *Watson v. Carroll*,⁵ where the plaintiff had been arrested in several suits while privileged as a barrister, and obtained an order for his discharge in one suit, and claimed to be discharged in all, and because the sheriff detained him he brought

¹ 4 Ves. 691.

² 1 Rose, 260.

³ 1 Q. B. 525.

⁴ 6 Rep. 52 b.

⁵ 4 M. & W. 592.

*519 an action, it was adjudged against him, for he was * only entitled to his privilege as far as he claimed it, and if he claimed it only in one suit, the sheriff had a right to detain him in the others. The cases of privilege are therefore irrelevant to the question,—When is custody, which would otherwise be lawful, rendered unlawful by imprisonment by trespass?

With respect to the expediency of overruling *Barratt v. Price*, if my review of the authorities is correct, no uncertainty would be introduced into the law thereby; on the contrary, certainty would be increased by removing an anomalous inconsistency.

Except for the suggestion in *Collins v. Yewens*, that it tends to discourage bailiffs from imprisonments by trespass, I am not aware of any advantage being thought to flow from it; on the other hand the evil from it is considerable. It comes into operation only where a trespass is committed upon a judgment debtor evading legal process, and then its operation is to enable him *pro tanto* to render judgments fruitless, and to defeat his just creditors, and as he may recover compensation from the wrongdoer, this is a gratuity to an evasive debtor at the expense of an innocent party.

Also the mischief is not confined to the cases of a real trespass on a debtor, but it enables any debtor by a collusive trespass to take the benefit of the rule in *Barratt v. Price*, and use it to defeat the law. The facts on this record, if I understand them rightly, exemplify what I mean. The counterfeit writ of Arambura answered the purpose of Bacon to be arrested by trespass under it, and it could not have been intended to answer any useful purpose as a writ, there being not any action nor affidavit nor *præcipe*; he was arrested as if waiting for it; he remained a week in nominal rather than real custody, protected by it, collecting his assets to go abroad; he then obtained his discharge from Arambura by notice, not to the sheriff, but to the attornies who had issued the

*520 writ which was so useful to * him; he then applied to be discharged from Lane's suit, on a summons to the sheriff alone, without notice to Lane, and was ordered to be discharged, which order would not be properly obeyed unless he was so set free as that all trace should be lost. Thus protected, he escaped with his property abroad, and if *Barratt v. Price* is affirmed, his example may be followed by any debtor wishing for protection from his creditors, and able to procure an attorney to deceive the sheriff by a counterfeit writ, or a bailiff to trespass in arresting.

The rule is bad between debtor and creditor, but it is worse as respects the sheriff. According to Lane's contention, the debtor who escapes by the rule in *Barratt v. Price* casts his debts on the sheriff, and if Lane's right is affirmed, a fraudulent debtor may suffer judgment to an accomplice for any sum which the sheriff would be likely to pay, and if a *capias* is lodged in that suit, and then an arrest by trespass in another suit, according to the formula given above, be added, the sheriff is fixed, and must pay the judgment debt, unless he can unravel the conspiracy in time.

The rule, bad in its results to creditors, works extreme iniquity, if, as above suggested, it exposes the sheriff to be a victim for unmeasured loss in case one of the agents, whom he is obliged to employ in matters of intricacy and importance, deviates from his duty by mistake or corruption. If the principles in *Thurland's Case* had been acted on, viz. that wrong is properly checked by prohibiting advantage from it, and commanding compensation for it, and that a wrong thus disposed of is at an end, so that the law in all other respects should take its course, as if it had never existed, the decision in *Barratt v. Price* would have been reversed. But if it is not overruled, still the case of *Lane v. Bacon* may well be distinguished from it, on the ground that the arrest in *Nokes v. Price* was taken to be a wilful intentional trespass in the execution of a * valid writ, while the arrest in *Arambura v. Bacon* was a trespass by mistake of the sheriff, intending to do his duty, and deceived by a void writ. * 521

In *Collins v. Yewens* it is suggested that the rule in *Barratt v. Price* is useful to check intentional arrests by trespass, this being the only ground of expediency suggested, but this reason has no application to an unintentional trespass arising from a mistake. In case of an arrest under a writ *ex facie* valid, in reality void, all detainers are lawful; the case of an arrest under a writ void *ex facie*, but supposed to be valid, is more analogous to the latter class of cases than to the class where a trespass is intentionally committed in executing the writ, as in *Nokes v. Price*, which led to the decision in *Barratt v. Price*. This distinction is sufficient to protect the sheriff in this case; and if the remarks I have made to show that *Barratt v. Price* should be overruled are not sufficient for that purpose, they may be sufficient to show that it should not be extended beyond the limits of the judgment given. But if *Barratt v. Price* is an erroneous decision, a great purpose of a Court of

error is fulfilled by overruling it, instead of recognising it, and distinguishing from it.

With respect to your Lordships' third question, whether there was any evidence for the jury that the plaintiffs in error were guilty of a breach of duty toward the defendants in error in arresting Bacon under Arambura's writ, my answer is in the negative. I think there was not. The facts relating to this question are these — [his Lordship stated them.] The only evidence of negligence in the sheriff was the omission of the clerk to perceive the absence of the second seal before he granted the warrant on Arambura's writ to Pearce's clerk; and the only person whose interest was affected by that negligence was Bacon, who obtained this * 522 * false imprisonment thereby. Upon these facts at the first trial the Judge ruled that they proved actionable negligence towards Lane, and this was held erroneous in the Exchequer Chamber, because it was a question for the jury, whether the omission to perceive the absence of the second mark showed such a want of reasonable care as to be actionable. On the second trial the question is left to the jury in form, but without any statement of the law on the point, and without any application of the evidence to the law of the case.

In support of my answer, that there was no evidence of any breach of duty towards Lane upon the part of the sheriff, it is necessary to ascertain what were the rights and duties between Lane and the sheriff, which depended on the writ. A party leaving a writ with the sheriff is, strictly, a principal dealing with an agent. The sheriff must execute according to his instructions, and in this, as in all cases, his duty is placed between opposite perils.

If the writ is left, with orders not to execute, and the sheriff arrests, he is a wrongdoer, *Barker v. St. Quintin*,¹ *Howard v. Cauty*; ² if it is left to be returned *non inventus*, it must lie; and the sheriff ought not to issue a warrant or arrest; but if the defendant is brought in, or chooses to come in, the sheriff must arrest; *Binks v. Mann* and another. The leaving a writ to be handed over from one sheriff to another, without information or application for warrant, did not create any duty to issue a warrant, or to inquire after Bacon, still less to arrest any person merely from the name of Anthony Bacon.

The Judge expressed himself as if the attorney for Arambura,

¹ 12 M. & W. 441.

² 2 Dowl. & L. 115.

leaving a void writ against Anthony Bacon, with address and description, and requesting an immediate *warrant * 523 thereon, with full information of identity, created some duty towards Lane which did not exist before, and which was broken by issuing a warrant for Arambura; and the notion seems to have been, that the sheriff not only should have found out that Arambura's writ was void, but also should have perceived by intuition, that the Anthony Bacon sued by Arambura must be the defendant sued by Lane; and because Arambura applied for a warrant, he should have spontaneously issued another warrant at the suit of Lane, against the unknown Anthony Bacon, and arrested him at the hazard of being able to prove his identity. This, I submit, was a mistaken notion, for the act of Arambura did not affect in any way the duty of the sheriff to Lane. Also the ruling, that the sheriff had a duty to perform towards all persons leaving writs in the office, was a mistake, if it meant that he had the same duty towards all, although the instructions and information in respect of each writ might differ; but if it meant that the sheriff had a different duty according to the circumstances, such an explanation would have shown that Arambura's application for a warrant was no evidence of any duty to issue a warrant for Lane. If Arambura had not applied, there is no reason for saying that Bacon would have been arrested at the suit of Lane. If, in consequence of Arambura's application, he was arrested and lawfully discharged, he was not arrested at the suit of Lane; and Lane's position was not prejudiced or altered by Arambura's act, and so Arambura's interference was no evidence of a breach of duty towards Lane. This is one ground for my answer to this question in the negative.

Another ground for this answer is the same as that in respect of which a *venire de novo* was granted in the Exchequer Chamber after the former trial; there the Court, speaking of the sheriff's omission to perceive the absence *of the mark * 524 which is necessary for the validity of a *capias ad respondendum*, said it should be left to the jury to consider whether that was evidence of such want of reasonable care as to be actionable; I understand by this that the Court adjudged that the mere fact of the omission to perceive the absence of the mark was not sufficient evidence from which the jury ought to infer a breach of duty towards Lane. I think that the fact by itself was not evidence of

such want of reasonable care in the sheriff as to give Lane a cause of action; and although the case was sent down in order that this matter should be considered by the jury, and it was in form left to the jury, yet the Judge, in the summing up, stated to the jury that the sheriff could, with reasonable care, have discovered the writ to be void. The evidence on this point is the same as on the former trial; the summing-up is substantially the same; the omission to detect the deception by the counterfeit writ is the sole ground for imputing actionable negligence towards Lane. I cannot perceive that it is any evidence for the jury at all, much less can it be sufficient to justify the verdict for the plaintiff; and therefore, on this second ground the answer in the negative to the third question is supported.

To the fourth question my answer is in the negative. The omission to enter judgment for the defendant upon so much of the general issue as is found for him makes the judgment imperfect; but as there is no defect in the finding of the jury, there is no ground for setting aside the verdict, and sending the case to another jury.

To the last question my answer is in the negative; there is no such inconsistency in the findings as to preclude a judgment on the whole record.

* 525 * MR. JUSTICE WIGHTMAN. — My Lords, it appears in this case that the plaintiffs in error, holding the office of sheriff of Middlesex, had in their hands, as sheriff, for the purpose of execution, a writ of *ca. sa.* at the suit of the defendants in error, against one Anthony Bacon, without any indication of his place of abode, or any information as to where he was likely to be found. Whilst this writ was in the hands of the sheriff, unexecuted for want of necessary information, a writ of *capias* to hold Bacon to bail in an action in the Court of Exchequer, at the suit of one Arambura, was delivered to the sheriff to be executed. In this process at the suit of Arambura the defendant's place of abode was mentioned, and a warrant was made out upon it, and Bacon was found at the place indicated, and taken into custody by the sheriff's officer; at this time, the writ of *ca. sa.* at the suit of the defendants in error was in the hands of the sheriff, but no warrant had been granted by the sheriff under it.

The writ at the suit of Arambura was in the form prescribed by

the Act of Parliament, and appeared in all respects regular upon the face of it, except that it had not the signature of the signer of writs of the Court of Exchequer, though it had the seal of that Court upon it. It appears that, by the practice of the Court of Exchequer, writs of *ca. sa.* and *fi. fa.* do not require the signature of the signer of writs, and that the writ of *capias* to hold to bail is the only writ from that Court which does require it.

Assuming, as seems to have been assumed in the Court below, and upon the argument before your Lordships, that the omission of the signature of the clerk was not merely an irregularity, but such a defect as made it bad upon the face of it, will the arrest under that bad writ be available as an arrest under the good writ at the suit of the defendants in error, which the sheriff had in his hand at the time *to be executed? The general *526 rule of law is, that if a sheriff has several writs against the same person, and arrests him on one, he is to be considered as arrested and in custody on all. In *Barrack v. Newton*,¹ Mr. Justice Patteson says: "If a man is taken on the only writ in the sheriff's office, and that is bad, detainers lodged afterwards are also bad; but if there be fifty writs in the office, and the sheriff arrests on one, the supposition of law is, that he arrests on all at once, and if one be bad, the rest are not vitiated, unless the sheriff himself has been guilty of some misconduct." In *Robinson v. Yvrens*,² Mr. Baron Parke, admitting the general rule, observes, "That the case of *Barratt v. Price* introduced a very reasonable and proper distinction, that the first arrest must not have been illegal by the wrongful act of the sheriff."

Both these very learned Judges appear to have been of opinion that the general rule obtains, unless the first arrest is rendered illegal by some misconduct or wrongful act of the sheriff himself. In *Barratt v. Price*,³ which it is said introduced the distinction, the defendant was ordered to be discharged from a detainer, on the ground that the arrest, which was made in another action, was fraudulent on the part of the sheriff's officer. Lord Chief Justice Tindal, in giving the judgment of the Court in that case, observes, after stating the general rule, that "a detainer will hold good though the Court may, upon collateral grounds, unconnected with the act of the sheriff, order the party to be discharged from the

¹ 1 Q. B. 529.

² 9 Bing. 566.

³ 5 M. & W. 152.

first arrest; but where the sheriff has by his own act illegally arrested the defendant, the defendant is not in custody under the first writ."

In all these cases it seems to have been considered necessary, in order to take a case out of the general rule, * 527 * that there must have been some misconduct on the part of the sheriff which rendered the first arrest illegal on that ground. The first arrest being illegal by reason of some defect collateral to the act of the sheriff himself, will not prevent the operation of the general rule.

If that be so, how stands the present case? Was the arrest under Arambura's writ illegal by some collusion, fraud, or misconduct of the sheriff himself, or of his officer, which is the same thing? The illegality was by reason of the omission of the signature of the signer of writs, with which breach of regularity the sheriff had nothing to do; but it may be, that if he knew of the defect, but nevertheless thought fit to act upon process which he knew to be bad, the arrest would be inoperative as an arrest under the other writs, by reason of the sheriff's own personal default. There was no evidence whatever that the sheriff or his officer knew of the defect, and it may then be asked, as it has been, whether it is a defect which the sheriff ought to have known, and therefore, whether he was not guilty of misconduct in acting upon a writ which he ought to have known was bad.

If Arambura's writ had not been in the form prescribed in the Act of Parliament, that might have been a defect which it would have been a default in the sheriff not to have noticed, as the form of the writ would have been in violation of the general law of the land. But how or why is the sheriff to know that the Court of Exchequer requires a particular form to be observed with respect to writs of *capias* to hold to bail, which it does not require for other writs, and which is not required by the statute which gives it? The sheriff may have had many writs of *ca. sa.* and *fi. fa.* from the Court of Exchequer to execute, all having upon them the seal of the Court, but none having the signature of any officer * 528 of the Court; and how is he to * know that a *capias* to hold to bail from that Court, which has the seal of the Court upon it, and which is in the form prescribed by the Act, is bad, because it has not upon it a signature which he never saw upon any other writ issuing from that Court? But it is said that he might,

by using reasonable care and diligence, have discovered the defect. What was the care and diligence that he ought to have used, and which might have enabled him to discover an error of which he was otherwise wholly unaware, I am at a loss to know.

The writ at the suit of Arambura being bad from a defect in the writ itself, would afford no ground of defence to the sheriff in an action at the suit of Bacon, who would be entitled to be discharged from custody under that writ; but as the discharge would be upon grounds collateral to any breach of duty by the sheriff himself, if, as I think was the case, he was not guilty of any negligence or default; it appears to me, that Bacon was in the lawful custody of the sheriff, under the writ of the defendants in error, upon the authority of the cases to which I have referred, and I therefore answer the first question proposed by your Lordships in the affirmative: that Bacon was in the lawful custody of the sheriff, under the valid writ at the suit of the defendants in error, which was in the sheriff's hand when Bacon was arrested upon the invalid writs at the suit of Arambura.

If, however, Bacon was not in the lawful custody of the sheriff under the valid writ when he was arrested at the suit of Arambura, I am of opinion, upon the authority of the cases to which I have referred, that he was not in their lawful custody when brought before Mr. Justice Coltman; and I therefore answer your Lordships' second question in the negative.

I do not find any evidence for the jury, that the sheriff * was guilty of a breach of duty towards the defendants in * 529 error, in arresting Bacon under Arambura's writ: there was no evidence that the sheriff or his officers knew of the defect in Arambura's writ; nor do I think there was any negligence in not finding it out, for the reasons I have already mentioned; and I therefore answer your Lordships' third question in the negative.

With respect to the fourth question proposed by your Lordships, it appears to me that the omission of an entry that the plaintiffs in error go without day, as to so much of the matter charged against them as was found for them on the plea of not guilty, being only form, and amendable by the Statutes of Jeofails, as the misprision of the clerk is no ground of error. That it is amendable as a clerical error appears from the case of *Everard v. Bosvile*, cited in

Ellison v. Ellison.¹ The fourth question proposed by your Lordships I therefore answer in the negative.

The last question proposed by your Lordships is one of some difficulty.

The declaration contains two breaches: the first, that the sheriff did not, nor would, during a long space of time, to wit, three weeks after the *ca. sa.* at the suit of the defendants in error had been delivered to them, and although a reasonable time for that purpose had elapsed, take Bacon under that *ca. sa.*, though he was during all that time within the bailiwick. And the second breach is, that the sheriff afterwards, and at the end of the said space of time, did not take Bacon under the *ca. sa.*, but took him under the false pretence of another writ.

The jurors have found that the sheriff was guilty of the first breach, but not guilty of the second; and they have also * 580 found on the seventh issue joined upon the matters * alleged in the second breach, that the sheriff did take Bacon under the false pretence of the other writ, as alleged.

The damages are only assessed upon the first breach, and the inconsistency in the findings upon the second, may not be very material, as the defendants in error claim nothing now under the second breach, and rest their case upon the first breach, the finding upon which, looking at the pleadings and the record, apart from the bill of exceptions, is perfectly consistent with the finding of not guilty upon the second breach.

But if the whole record, including the bill of exceptions, and the evidence and matters therein stated, are considered, the finding the sheriff guilty upon the first breach, and not guilty upon the second, does appear to raise an inconsistency which may render a *venire de novo* necessary.

The first breach might have been supported by evidence which showed that the sheriff might have arrested Bacon under the *ca. sa.* of the defendants in error, without any reference to the writ of Arambura, or before the sheriff arrested Bacon under that writ; but there is no evidence of any breach of duty except that, which is alleged to have occurred in arresting Bacon under Arambura's writ, which is the default charged in effect in the second breach, which is for arresting Bacon under the false pretence of another writ (Arambura's) which had no existence in reality,

¹ T. Raym. 38.

whereby the sheriff was unable to take or detain him under the writ of the defendants in error, and was obliged to let him depart from their custody. All this, which is alleged in the second breach, is negatived by the finding of the jury upon the plea of not guilty to the second breach ; and it is difficult to reconcile that finding with the case of the defendants in error as it appears upon the record, including the bill of exceptions, and with their case as it was argued before your Lordships. Whether that finding was * really intended, or was entered as it is by mistake, I * 531 know not ; but I should suspect the latter, as it seems quite inconsistent with the finding upon the seventh issue, and as it seems to me hardly consistent, under all the circumstances of the case, with the finding upon the first breach. I am, therefore, upon the whole, disposed to think that upon that ground there ought to be a *venire de novo*.

MR. JUSTICE CRESSWELL. — In order to answer the first question proposed by your Lordships, it is necessary to consider what was the effect (if any) of the caption said to have been made at the suit of Arambura. No writ issued at his suit ; the instrument taken to the sheriff's office was not a writ ; it gave the sheriff no authority to grant a warrant to take the person of Bacon, and he ought to have known that. The sheriff therefore in granting that warrant acted of his own wrong, and the warrant gave no legal authority to the bailiff. The caption was just as illegal as if the sheriff, without having received any document or instructions whatever, had ordered an officer to take him. At that time Bacon was certainly unlawfully imprisoned. There is no authority for saying that, on such illegal caption being effected, he was immediately in lawful custody under the valid *ca. sa.* issued at the suit of Lane. When there are several valid writs in the sheriff's hands against the same person, the sheriff may take the party under any one, and by so doing he in effect takes him under all, for all immediately operate as detainers ; but unless he takes him under one, he certainly cannot be said to take him under all. Here the officer did not take him under any writ. How, then, can it be said that he took him under the writ at the suit of Lane ? I am of opinion that it cannot be so held either on principle or authority.

* Upon the second question. — Although not in lawful * 532

custody immediately on being taken, was he in lawful custody at the suit of Lane when brought before Mr. Justice Coltman? In answering this question, I will assume that the case is the same as if the sheriff had actually claimed to take him under this writ when in his custody. The original taking was undoubtedly unlawful, being without any writ or warrant granted upon a writ. The supposed second caption or actual detention afterwards by virtue of Lane's writ must therefore be subject to the same considerations, whether that writ was lodged with the sheriff before or after the original taking.

Now in *Barrack v. Newton*¹ Mr. Justice Patteson says: "If a man is taken on the only writ in the sheriff's office, and that writ is bad, detainers lodged afterwards are also bad." But the original taking being without any writ must be at least as illegal as under a bad writ, and therefore the subsequent detainer under Lane's writ must, according to Mr. Justice Patteson's rule, be bad also.

But this point was determined long before the case of *Barrack v. Newton*, by the Court of Exchequer, in *Barlow v. Hall*,² and by Lord Eldon in *Ex parte Ross*.³ Ross, a bankrupt, during his attendance at a meeting of the commissioners to pass his examination, was arrested, and several other writs were lodged in the secondary's office, some before and some after the arrest. Upon a petition for his discharge being discussed, Lord Eldon said: "It has been repeatedly determined that if the arrest is bad all the other writs are rendered inoperative as detainers, nor can there be any difference whether such writs were lodged before or after the arrest; it is the arrest alone that gives efficacy to the detainers, and if it be illegal it can give effect to nothing."

It has been supposed that the case of *Ex parte Ross*, and some others of the same kind, might be explained and disposed of by the consideration that they were founded on the privilege of the party arrested, which would equally protect him against all writs in the sheriff's office at the time. But that observation would not apply to writs lodged after the caption, and the writ now under consideration must be for this purpose considered as lodged after the taking. If the plaintiffs in error rely on its having been issued and lodged before, that can only be to take advantage of the

¹ 1 Q. B. 529.

³ 1 Rose, 260.

² 2 Anstr. 461.

original taking, which has been already disposed of, and which, for the purpose of this question, is assumed to be such that it would not give effect to other writs in the sheriff's office.

*Barratt v. Price*¹ is another direct authority on this point; nor can I find any decision that where a party has been arrested by a sheriff acting illegally, his detention by virtue of another writ in the sheriff's office can be justified.

In *Robinson v. Yewens*,² Mr. Baron Parke says: "The old rule was, that if the sheriff had several writs against the same party, and arrested him on one of them, he was to be considered as in custody on all. The case of *Barratt v. Price* introduced this very proper and reasonable distinction, that, in order that that consequence should follow, the first arrest must not have been illegal by the wrongful act of the sheriff." He, therefore, as did the rest of the Court of Exchequer, recognised the soundness of the decision in *Barratt v. Price*, although he considered that it had introduced a distinction. I doubt whether that very learned person was correct in ascribing to the Court of Common Pleas the introduction of any new doctrine. It seems to me that the rule upon which the Court acted in *Robinson v. Yewens*, *Bar-* * 534
rack v. Newton, and in *Eggington's Case*, viz. that where a first arrest could not be sustained, by reason of some irregularity in the writ, or misconduct in some person not affecting the sheriff, the party arrested might be well detained or taken under another writ to which the objection did not apply, was rather an exception out of the generality of the rule laid down in the cases of *Barlow v. Hall* and *Ex parte Ross*. From the first of those decisions until the present case arose, the doctrine there laid down has never been questioned by the Courts in Westminster Hall; and I think we ought not now to depart from it, unless it can be shown that it violated some legal principle. The only principle that can be said to have been violated is, that the plaintiff below (Lane) had a right to have his writ executed against Bacon, and that the sheriff could not deprive him of that right by taking Bacon wrongfully. The argument is plausible, but founded on a fallacy as to the right of Lane; his right was to have Bacon taken according to law, not contrary to law; if the sheriff could have executed the writ according to law, and he neglected to do so, the remedy is against the sheriff; Lane had no right to obtain compensation for the sher-

¹ 9 Bing. 566.]

² 5 M. & W. 152.

iff's neglect, by having Bacon taken and detained contrary to law. But then it is said, that although the sheriff may have acted illegally in taking Bacon, who may sue him for the wrong, the defendants in error under whose writ of *ca. sa.* he was detained, were entitled to have him so detained, applying to writs of execution against the person that which appears to have been said by Littleton and others as to writs of *fi. fa.* in the Year Book 18 Edw. 4, 4 a, pl. 19: "That the sheriff cannot break the defendant's house by force of a *fi. fa.*, but he is a trespasser by the breaking, and yet the execution which he then doth in the house is good."

* 535 There are * other dicta in the books to the same effect, but

I do not find that it has ever been solemnly decided, and I cannot but consider that it is still an open question, and at all events it has never been extended to process against the person since the decision of *Thurland's Case*,¹ and it is directly at variance with all the modern decisions that have been referred to. For these reasons, it seems to me that when the plaintiffs in error brought Bacon before Mr. Justice Coltman, he was not in their lawful custody at the suit of the defendant in error.

Upon the third question, I am of opinion that the plaintiffs in error were guilty of a breach of duty towards the defendant in error in not arresting Bacon under his writ; if they had arrested him in the first instance under that writ, they would not have been guilty of any breach of duty by claiming to take him at the suit of Arambura also; by taking him at the suit of Arambura, and not under Lane's writ, the plaintiffs in error were guilty of a breach of duty, for the sheriff (had due care been taken) must have known that the pretended writ at the suit of Arambura was a nullity. Every suitor who lodges a writ with the sheriff has a right to have it duly and legally executed. If the sheriff has several writs, he effectually executes all by a caption, legally made under one; but if he negligently makes an unlawful caption, not under any one of those writs, he is guilty of a breach of duty towards each party whose writ remains unexecuted, for the very caption complained of shows that the sheriff had information which would have enabled him to make a legal caption, and so to have executed Lane's writ.

Upon the other questions proposed by your Lordships, I concur with the opinions already expressed by my brethren.

¹ Dyer, 241 b, 244 b.

* MR. JUSTICE COLERIDGE, having fully stated the facts, the * 536 pleadings, and the direction given to the jury, said: The finding of the jury on the second trial makes it now material only to consider whether Lord Denman and the Court below were right in their judgment, that there had been no arrest at the suit of the plaintiffs. Substantially, the question thus raised will be found to turn on this: Under what circumstances is an arrest in fact by the sheriff at the suit of one plaintiff to be considered as in fact, or to enure in law, as an arrest at the suit of any other plaintiff, who, at the time of such arrest, or during the imprisonment under it, has lodged a *ca. sa.* in the sheriff's office? For there was no pretence for saying that in fact and by intention the sheriff arrested at the suit of the plaintiffs when the illegal arrest took place at the suit of Arambura; and with a view to understanding the direction, this seems right to be stated, for it follows from it that the Judge at *Nisi Prius* and the Court below must be understood to mean, that although Bacon was in bodily restraint by the act of the sheriff, yet such restraint was not attributable to the writ sued out by the plaintiffs in any such sense as to be justifiable under it. Arrest under a writ *simpliciter* means, of course, a lawful arrest, which that writ authorises, and will maintain the continuance of; if it be meant to speak of it in any other sense, the qualification of illegal or unauthorised must be added.

In considering the question thus raised, I must venture to premise one or two general observations. Much has been said as to the natural right of the plaintiff in execution, and what is required in this case, in order to do justice to him. Now I know of no other right which a plaintiff, recovering a judgment in a Court of law, has to satisfaction by imprisoning his debtor, than that which the * municipal law gives him. Some have sup- * 537 posed that the creditors of an insolvent might, by the Roman law, have divided his body among them; some, that even by our law, an execution creditor may detain the dead body of his debtor dying in prison. Our law denies the power of imprisonment in execution, if the debt falls below a certain amount, but it gives it, where it gives it at all, equally against the honest and unfortunate as against the fraudulent debtor; and it gives it equally to the harsh and extortionate as to the equitable creditor, without regarding circumstances.

In respect of mesne process, every one knows how importantly

the powers of creditors as to imprisonment have been varied from time to time. The whole is the mere positive creation of the municipal law. If the plaintiff's case be within the rule which the law lays down, then he has a right: if it be not, he has none. And in searching what the rule is, it can serve only to mislead the judgment to assume certain natural rights or equities; and then infer that the rule of law must be that which secures them, instead of examining the ordinary sources of legal information, and ascertaining from them what the rule actually is.

Next, I will observe, that in this examination of decisions it is a duty of great importance, if you find that, for a considerable period of time, coming down to the present, certain decisions have been accepted as laying down the law, have been referred to from time to time, and recognised by the Courts, and acted upon by those whom it particularly concerns as their guides, not to disturb those decisions, even if you doubt whether they were wisely come to originally, and might perhaps have differed from them if you had then had an opportunity. This is a rule essential to the * 538 certainty of the law, and is, I think, equally binding * upon us when answering questions propounded to us in this House, as when we are sitting in our own Courts. However large your Lordships may consider to be the extent of the discretion under which you are authorised to exercise your judicial functions, — as to which I say nothing, — when you ask us what the law is, we are to answer exactly on the same principle as that on which we administer it in our own Courts.

Upon these principles, I proceed to consider under what circumstances a party *de facto* arrested by the sheriff at the suit of one person is to be considered in law as arrested at the suit of any other, who at the time of such arrest had placed a writ against his body in the hands of the sheriff. The principle upon which this question is to be answered is formally laid down in the case of *Barratt v. Price*,¹ which for more than twenty years, according to my own judicial experience, has been commonly referred to as the leading case on the subject. It is this, that where the sheriff has once made an arrest, valid as regards himself and his own authority, his act operates as an arrest at the suit of all other plaintiffs in all actions in which he holds writs against the party at the time. He could do no more than go through the form of several arrests

¹ 9 Bing. 566.

in those actions, and there is no necessity for him *actum agere*, that is, to arrest again the defendants whom he already holds arrested. But when the act he has done is one on which he cannot stand, is as against him a false imprisonment, an illegal arrest, then it cannot operate as a legal arrest under any other writ which he may hold. And this distinction seems a very reasonable one, where the sheriff has a writ good on the face of it, issues a lawful warrant, and causes the defendant, not being privileged, to be arrested in a place not * privileged by the officer duly armed * 539 with the warrant; he has strictly obeyed the writ, performed his duty, and can do no more. It may be that, owing to some previous misconduct of the plaintiff, of which he knows nothing, the arrest may be invalid as against him, but that will not affect the sheriff; his act will still have its full effect as regards all other persons for whom he was acting at the same time. On the other hand, if the sheriff breaks the law in making his original arrest, that vice taints his whole proceeding, otherwise the same act must be considered illegal and legal at the same moment.

If this limitation of the rule be properly laid down, there can be no doubt that the present case falls within it. The sheriff could not justify the arrest of Bacon, for the only warrant which he had issued, and which the officer held and acted on, was founded on no writ; nothing but a good writ could be the sheriff's justification, and that justification was wanting.

Then was the decision in *Barratt v. Price* founded on any sound principle, or has it been acted on since, without having ever been overruled? If both these questions are to be answered in the affirmative, it must be taken, I conceive, to lay down the law, which at present the Courts at Westminster Hall are bound to administer.

It is not questioned, I believe, that the general rule as recognised in *Barratt v. Price* stands on previous authority; *Davies v. Chippendale*¹ is a decision in point. So is *Barclay v. Faber*.² But the question will be made on the limitation which it prescribes to the rule, namely, that it will not apply where the first arrest is illegal in respect of some act of the sheriff himself. All the decisions, and they are not a few, in which it has been held that where * the illegal arrest has been procured by a wrongful * 540

¹ 2 Bos. & P. 282.

² 2 B. & Ald. 743.

act of the plaintiff himself, he cannot avail himself of it so as to detain under any other legal process so long as the original illegal custody continues, may be considered as authorities by analogy for this limitation. As such a wrongdoing plaintiff cannot use his own wrongful act to make available a subsequent detainer, which but for this might have been valid, so the sheriff cannot use his in order to the execution of other writs which it is his duty to execute.

But all the three Courts have recognised the limitation; in *Pearson v. Yewens*,¹ the Common Pleas; in *Robinson v. Yewens*,² the Court of Exchequer; in *Collins v. Yewens*,³ the Court of Queen's Bench. Both these latter cases are important. In the first of them Mr. Baron Parke speaks of the distinction laid down in *Barratt v. Price* "as a very proper and reasonable one," and all the three Judges who decided the case make the hinge of the decision to be, whether the facts were within *Barratt v. Price* or not. In the first the judgment of the Common Pleas, and the language used by Chief Justice Tindal in enunciating the principle, were expressly cited and made the ground for the decision. These three cases concerning the same defendant, and decided at the same time, having each some varieties in their facts, which did not escape notice, presented the general question in all its bearings; and I hardly know how the decision of a single Court could receive a more satisfactory confirmation and settlement, short of a judgment of this House, than *Barratt v. Price* then received by those three independent judgments.

This was in 1839. In 1853, *Eggington's Case* came before the Court of Queen's Bench on two occasions, and was *541 * much considered; in it the limitation laid down in *Barratt v. Price* was applied to the case of a criminal arrest. On two occasions the same parties sought to detain by new, and in themselves unobjectionable warrants, one whom they had first arrested illegally on the same charge, and he was discharged as to both; but a plaintiff in a civil suit being entirely unconnected with the former proceedings having delivered a writ of *ca. sa.* to the sheriff while the party was in custody, and the sheriff having made his warrant and detained him, such detainer was held good, because the original arrest had not been made by any one as officer

¹ 5 Bing. N. C. 489.

² 10 A. & E. 570.

³ 5 M. & W. 149.

of the sheriff, and so *Barratt v. Price* became as to this last detainer inapplicable.

I own it seems to me that there is abundant authority on which such a point as this ought to be considered settled ; and even if I were satisfied that earlier cases might be found in the Year Books, or Lord Coke's Reports, or elsewhere, on which doubts might be raised, or that if the matter were entire, some more satisfactory conclusion might now be come to, I should not be in the least moved as to the propriety of abiding by what has been thus determined.

It is no doubt true that this is not a conveyancing or an insurance cause, and that your Lordships will not disturb the practice of Lincoln's Inn, or unsettle the course of business in Lloyd's coffee-house, by reversing *Barratt v. Price*, but it is never without mischief that uncertainty is introduced into legal decision.

I must not, however, be understood as conceding that the case was decided inconsistently with old authorities. I do not mean to go through the long series of decisions cited at the bar, and commented on to-day, but I will mention two or three a good deal relied on in argument on the other side, and as I think without foundation.

The earliest is the Year Book 18 Edw. 4, 4 *a*, pl. 19, which * is shortly this : Catesby comes to the bar, and asks whether * 542 a sheriff breaking into a dwelling-house to execute a *fi. fa.* does a wrong or not ; the Judges answer that the defendants may bring trespass against him, notwithstanding the *fi. fa.*, for that will not excuse him for breaking the house, but "*del prisel des biens tantum.*" This is cited in *Semayne's Case*¹ as establishing that the sheriff cannot break the dwelling-house by force of a *fi. fa.* but he is a trespasser by the breaking, and yet the execution which he then doth in the house is good. It may be doubted whether the Judges meant any thing more in the Year Book by the words above cited than to state generally what a *fi. fa.* authorised a sheriff to do ; but assuming that they did, still the dictum there and that in *Semayne's Case* are both purely extra-judicial. To make, however, either the one or the other of any weight in this argument, even if they were decisions, it must be inferred that here, though the sheriff might have committed a trespass on Bacon, for which Bacon might have sued him, yet the arrest, even

¹ 5 Rep. 93, 4th Rea.

at the suit of Arambura, was valid, as in those cases the taking of the goods was justifiable; but this I suppose no one will be bold enough to contend, and if not, their effect is the other way, as they lay a foundation for that distinction between execution on goods and execution on the person, which Baron Parke pointed out in *Percival v. Stamp*,¹ a case which indeed is an authority for those who uphold *Barratt v. Price*.

*Thurland's Case*² has also been cited, but to as little purpose when the facts are examined and the principle of the judgment ascertained. According to the second report of that case, which is more intelligible than the first, at page 241, the sheriff, *543 at the request of plaintiff's agent, *arrests a judgment debtor without writ or warrant; then they two procure a *ca. sa.*, and the sheriff arrests him again, and brings him into Court with the writ returned *cepi corpus*. The defendant prays the Court to reject the writ and return. The plaintiff prays the Court to commit him in execution, and "upon great consideration the prayer of the plaintiff was granted, because he was not *particeps criminis* in this undue arrest, which was tortuous to the defendant, of which injury or fraud the plaintiff should not have any advantage, although these followed a legal act; and also a writ of false imprisonment lies against the agent of the plaintiff and the sheriff, in which the party shall recover damages as well for the last arrest and continuance of the imprisonment as for the first. But because the plaintiff was found clear and free of the injury and covin in the purchase of the writ, therefore the defendant shall be committed, &c. and the sheriff shall be amerced 10*l.* and the agent 5*l.*" The reporter put a query here as to the liability for the last arrest; but the material point now is, not whether the case was well decided, which may well be doubted, but on what principle the Court proceeded. Now it is clear the Court considered the sheriff wrong throughout, and that as against him even the arrest under the good writ was a wrongful act; but because there was a good writ, and a subsequent arrest under it, which in themselves would have warranted the defendant's detention, and the plaintiff stood free of all complicity in any wrongful act, they at his prayer committed the defendant to the Fleet, and so gave him the benefit of that second arrest. How then is this decision available for the sheriff on the question now before the House?

¹ 9 Exch. 168, 172.

² Dyer, 244 b.

But I would seriously ask those who rely on it, whether they contend that sheriffs' officers may apprehend debtors without writ or warrant, and then, by subsequently obtaining both, become * entitled to hold them? I hardly know a doctrine more * 544 contrary to legal principle, or more likely to lead to mischievous breaches of the peace and acts of violence. Yet this would seem the legitimate inference to be drawn from *Thurland's Case*, as apparently understood on the other side.

But in *The Countess of Rutland's Case*,¹ the true rule seems laid down. There the sheriffs had a good writ against the countess, and had issued a warrant: the officers proceeded illegally, took her to the Compter as in another pretended suit; at the door of the prison the sheriff appeared, and carried her away to his own house. The Court held the arrest illegal, and would not refer it to the writ and warrant, saying, that "the sheriff, or any other by his authority, who makes an arrest, ought on the arrest to show at whose suit it is, out of what Court, for what cause he makes it, and when the process is returnable; to the intent that if it be for any execution he might pay it, and free his body, if he will, from imprisonment, and if it be on mesne process, either to agree with the party or to put in bail according to law, and to know when he should appear." I might add, perhaps, to this, another reason, that the defendant might know with all certainty that he is bound to yield submission to the person who assumes to deprive him of his liberty.

The cases of *Howson v. Walker*, and *Crowden v. Walker*,² were relied on in the argument, and have been to-day, but they received their explanation from the Court in *Barratt v. Price*. Herne, who committed the illegal act in making the first arrest, was indeed a sheriff's officer; but there is nothing stated in the case which shows that he was acting by the command of the sheriff, or with his privity: * there was nothing, therefore, to prevent * 545 the sheriff by Howse, to whom he had previously granted a warrant, from availing himself of the means of arresting which the illegal custody afforded; and if it had been clear that the plaintiff Howson had been equally clear of complicity with Herne, I should have thought that the second arrest would have been equally available for him. I suspect, if the facts of the case were fully before us, it would be found that Herne had acted

¹ 6 Rep. 52 b.

² 2 W. Bl. 823.

at the request, or with the privity of Howson, or Howson's attorney.

On these grounds I conclude that the Court below was right in holding that Lord Denman's direction to the jury, on the fact of an arrest, was correct, and I now proceed to answer your Lordships' questions shortly in order.

To the first and second questions, which appear to me to stand on the general grounds which I have already discussed at so much length, my answer is in the negative.

To the third question, I answer in the affirmative. I think that there was evidence of negligence in the discharge of that duty which the plaintiffs in error owed to the defendants in error, at the time when they arrested under Arambura's (supposed) writ.

To the fourth question it seems to me that the record is incomplete, and therefore erroneous, in not discharging the plaintiffs in error, as to so much of the issue on not guilty as was found for them.

To the fifth question, I answer, that to deny that the defendants wrongfully, unjustly, and illegally took and imprisoned Bacon under a false and illegal pretence, and to affirm that they did take and imprison him under a false and illegal pretence, the pretence specified in both propositions being the same, are propositions repugnant to each other in terms. But I cannot, therefore, infer,

that the findings on this plea of not guilty, and on the
 * 546 seventh plea, * are necessarily inconsistent; for the allegation in question does not constitute the whole of the complex issue raised by the plea of not guilty, and the finding of the jury may, therefore, not have depended on it. I do not, therefore, think that a *venire de novo* is necessary on this ground.

August 28.

THE LORD CHANCELLOR, after fully stating all the proceedings in the Courts below, said: The defendants below then brought a writ of error before this House; and the case was fully argued at your Lordships' bar last year, towards the close of the then session of Parliament, in the presence of the learned Judges. Several questions were put to the Judges, with a view to assist your Lordships in the decision of the case. The Judges desired time to consider the arguments which had been urged at the bar, and a few weeks since, that is to say, shortly before the late summer circuit,

they gave their answers to the questions which had been put to them. There was a difference of opinion among them, some being of opinion that the ruling of Lord Denman was right, the others that it was wrong, and so that a *venire de novo* ought to have been awarded.

The view of such of the learned Judges as think that the judgment below ought to be reversed is, that the defendants (the sheriff) cannot be answerable to the plaintiffs, inasmuch as they strictly performed their duty towards the plaintiffs; that admitting the arrest at the suit of Arambura to have been unjustifiable, yet there is no rule or principle of law which prevents a sheriff who has by trespass a defendant wrongfully in custody, at the suit of one plaintiff, from detaining him at the suit of another plaintiff, who has lodged a regular writ of *capias ad satisfaciendum* in the office to be executed, and who was unconnected with the illegal arrest; that therefore Mr. Justice Coltman ought * not to have * 547 discharged Bacon from custody, when the sheriff claimed to detain him by virtue of Lane's writ, and so that the damage to the plaintiffs was occasioned, not by any breach of duty on the part of the defendants, but by the improper discharge of Bacon by the Judge.

On the other hand, the learned Judges who concur with the judgment of the Court below, are of opinion that when the sheriff has a defendant in custody in circumstances which make that custody illegal as between the sheriff and the party detained, and so entitle the latter to be discharged from that illegal detention, the sheriff is bound to discharge him, whatever valid writs he may have held at the time of the illegal arrest, or which he may have received afterwards during the illegal imprisonment, and that therefore, in the present case, if the illegal arrest at the suit of Arambura is to be treated as having been the consequence of a culpable neglect of duty on the part of the sheriff, the defendants below, they were rightly ordered by the Judge to discharge Bacon from custody, and so by that which was the natural consequence of their original breach of duty, they disabled themselves from executing the writ lodged with them by the plaintiffs.

The decision of the case turns entirely on the question, What is the effect, as to third persons who have placed writs in the sheriff's hands for execution, of his illegally arresting a defendant on a bad writ; that is to say, so arresting him as that the party arrested, if

there were no other writ against him, would be entitled to be set at liberty? Is the party so illegally arrested entitled to be set at liberty in spite of the existence of other and valid writs in the hands of the sheriff, or are the persons who have lodged those valid writs entitled to say that the sheriff has a right to execute and must execute them against the party in actual custody, whether that custody be lawful or unlawful?

* 548 * On the part of those who take the view of the present case favourable to the defendants below, it is said that, looking at the question independently of authority, a rule which disables the sheriff from executing a valid writ because he has previously taken the defendant on an invalid one, is unreasonable, operating unjustly both on the sheriff, and on the plaintiff who has lodged a writ with him: on the sheriff, because it may happen that, by want of caution of his officer, there is some irregularity in the arrest which may subject him to heavy responsibilities towards others unconnected with the arrest complained of; and further because an unscrupulous plaintiff and defendant may collude together to get the defendant irregularly arrested in a fictitious suit, in order that the plaintiff may obtain a right against the sheriff, and so obtain payment at his expense. It is said also to act unjustly towards the plaintiff, who has sued out and lodged his valid writ with the sheriff, because it deprives or may deprive him of the remedy to which he is entitled, by taking the body of his debtor in execution; and though the right of action against the sheriff will in general be more than a compensation, this may not always be the case.

Those who take the opposite view of the case say, that to allow the sheriff to avail himself of a custody which he has brought about by illegal means, would be to encourage carelessness and misconduct on the part of him and his officers, by permitting them, through their own illegal act, to accomplish objects which they could not otherwise attain, thus enabling them to profit by their own wrong; besides which, due regard to the liberty of the subject requires that a person illegally arrested should have an absolute, unqualified right against the person who has illegally arrested him, to be set at large without reference to what may be the consequence of his liberation to others.

* 549 * On weighing the arguments on both sides, I have come to the opinion that those in favour of the defendants in

error must prevail. It has been said, and was so argued in this case, that the sheriff is to be considered as the agent of those who put their writs into his hands ; and that his officer, to whom a particular writ is delivered for execution, is the agent only as to that particular writ. For some purposes this is true, but not for all ; and it is necessary to guard against the very common error of acting on that which affords an argument by analogy, as if the resemblance in some particulars constituted an identity in all.

When a sheriff arrests a defendant in circumstances which make him a trespasser, as, for instance, if he arrests him at a place out of his bailiwick, or arrests him without a writ, there can be no doubt but that the party so arrested is, as between himself and the sheriff, entitled to be discharged, and the sheriff certainly could not, on any ground personal to himself, claim to detain him. The question is whether, though as between himself and the sheriff the party arrested is entitled to be discharged, the sheriff may not, as agent for other plaintiffs who have placed writs in his hands, detain the party thus illegally arrested ? The arrest, it is contended, is not in fact made by the sheriff, but by one of his officers ; and though the act of the officer is the act of the sheriff, for the purpose of making him responsible to those affected by what the officer has done, yet, as to third persons, it is said to be otherwise. It is contended that the party who has put a writ for execution into the sheriff's hands, has a right to say that, as to him, the sheriff is an agent bound to execute the writ by himself, or a competent officer as his deputy, and that it is no answer to say that another officer of the sheriff, in another action, has acted illegally. But the answer is, that the sheriff,* though * 550 for some purposes an agent of the party who puts the writ into his hands, is not a mere agent. He is a public functionary, having indeed duties to perform towards those who set him in motion, analogous, in many respects, to those of an agent towards his principal ; but he has also duties towards others, and particularly towards those against whom the writs in his hands are directed. Therefore it is that arguments drawn from decisions as to the execution of writs against goods, writs of *fieri facias*, for example, have little bearing upon the present case. If a sheriff, in executing a writ of *fieri facias*, acts illegally, by breaking open an outer door, and then seizes the goods of the defendant in the house, this may give a right of action to the person injured by the

illegal breaking ; and yet the sheriff may, if the law be correctly laid down in the case cited from the Year Books, be entitled to sell the goods. There is no analogy between such a case and that of the unlawful seizure of the person. The goods cannot complain ; they are not injured by the wrongful act ; the sheriff had no duty to perform towards the goods, but only towards their owner. And this shows that no reasoning drawn from decisions on writs of *feri facias* can apply to cases where the arrest of the person is in question.

If a sheriff holding a valid writ at the suit of A., and an invalid writ at the suit of B., arrests on both writs, the arrest is certainly good, because a good ground of arrest exists, and is (I assume) made known to the party arrested. If holding a valid and also an invalid writ, he arrests on the invalid writ only, then he is not entitled for his justification to rely on the valid writ. He is bound, when he executes the writ, to make known the ground of the arrest, in order, among other reasons, that the person arrested may know whether he is or is not bound to submit to the arrest.

* 551 * Where the sheriff has arrested on one good and valid writ, he may detain on any number of valid writs which he had at the time of the arrest, or which may afterwards have reached him. A subsequent arrest would in such case be an idle form ; indeed, it could not, in the very nature of things, be made at all, if arrest is considered to mean an act whereby the person arrested is deprived of freedom. Of that he would have been already lawfully deprived, and he could not by any subsequent form of arrest be deprived of what had already gone from him. But in the case of an arrest on an invalid writ it is different. Though the party arrested has been deprived of his liberty, that has been done in circumstances which make it the duty of the sheriff to discharge him ; he has no right to treat him as a person deprived of his liberty, and an arrest on the valid writ is therefore necessary.

But to allow the sheriff to make such an arrest while the party is unlawfully confined by him, would be to permit him to profit by his own wrong, and therefore cannot be tolerated. He cannot arrest him, because he has already deprived him of his liberty ; he cannot detain him, because he is entitled to be discharged.

This doctrine was acted on by the Court of Common Pleas in the case of *Barratt v. Price*, from which I think it impossible to distinguish that now before the House. There an officer of the

sheriff held a warrant to arrest the defendant. The officer's son, without any lawful authority, took on himself to arrest the defendant, and handed him over to a police officer on a false charge of felony. The father having notice of these facts, delivered the warrant to his son in the hope that he might thereby justify the arrest made by him. But a Judge, on application to him, ordered the defendant to be discharged from that arrest. He was, however, detained on a *capias ad satisfaciendum*, * which * 552 had been lodged with the sheriff by the plaintiff, Barratt, who was in no way connected with the illegal arrest; and the question was, whether the defendant was entitled to be discharged from that detainer, as well as from the original illegal arrest? The Court considered that he was. Chief Justice Tindal held that the illegal act of the officer was the illegal act of the sheriff; and that as the sheriff had by his act illegally arrested the defendant, the defendant was not in custody under the first writ, but was suffering a false imprisonment, and that such false imprisonment, being no arrest in the original action, could not operate as an arrest under the other writs lodged with the sheriff. The Chief Justice took care to explain that he did not mean to infringe upon, indeed he expressly recognised, the doctrine, that where a sheriff has several writs against the same defendant, and arrests him under one of them, that virtually operates as an arrest under all. To make a second arrest of a defendant already in custody would be a mere form *actum agere*. But where the sheriff has a defendant in custody by virtue of what amounts to a false imprisonment, there the first writ is out of the question; he cannot rely on that as having given him any authority; he is a mere trespasser, and in contemplation of law has not arrested the defendant at all.

In the argument at your Lordships' bar, it was attempted to be shown that the case now under discussion differs from that of *Barratt v. Price*, because there the arrest was made by virtue of a fraudulent contrivance, and a pretended criminal charge, which is not the case here. No doubt there is that distinction; but it is plain that the judgment of the Court in *Barratt v. Price* did not proceed on that ground, but on the general principle that where the defendant is in custody of the sheriff in consequence of an act which makes the sheriff a trespasser, he is entitled to be discharged, even * though the sheriff had in his hands a writ * 553 under which he might legally have made the arrest. The

case of *Barratt v. Price* was decided by the Court of Common Pleas, when Chief Justice Tindal presided there, and has subsequently been recognised as good law in all the Courts in Westminster Hall.

In *Pearson v. Yewens* in the Common Pleas, and in *Collins v. Yewens* in the Queen's Bench, the defendant was discharged from custody on the express ground that he had been taken on an illegal arrest, to which the sheriff had made himself a party, and so that the case of *Barrett v. Price* was applicable. And though on the same arrest the Court of Exchequer in *Robinson v. Yewens*¹ afterwards refused to discharge the defendant in that action, that was because, on the evidence then brought forward, that Court was not satisfied that the sheriff was in any way privy to the original, to the illegal detention; and there is no doubt of the right and duty of the sheriff to arrest any one against whom he has a writ, and who can be found in his bailiwick, whether he is at large there, or is illegally detained there by a stranger. Baron Parke in that case expressly recognised the rule laid down in *Barratt v. Price* as being a proper and reasonable one, though the Court did not there act on it, because the facts there disclosed were not such as to make the rule applicable, Baron Maule expressly stating that the question was one entirely of fact. "This case," said that very learned Judge, "resolves itself into a question of fact, whether the sheriff did or did not illegally arrest the defendant in the first instance. The Court of Common Pleas, on one state of facts, came to the conclusion that he did, and applied the authority of * 554 *Barratt v. Price*. This * Court, on another state of facts and more evidence, comes to a contrary conclusion, which shows that *Barratt v. Price* does not apply, and that the rule ought to be discharged."

Though your Lordships are not bound by the decisions of the Courts below, yet it is manifestly inexpedient that what has been there continuously acted on as good law should afterwards be called in question in this House, unless it is made very clearly to appear that the principles on which the judgment have proceeded rest on no solid foundation. So far from that being the case in reference to the question now under consideration, I think that the doctrine propounded and acted on in *Barratt v. Price* is founded on solid good sense; and even if it be inconsistent with the early case in

¹ 5 M. & W. 152.

Dyer, referred to in the argument (*Thurland's Case*)¹, I have no hesitation in advising your Lordships to follow what can hardly be disputed to be the modern doctrine, acted on for the last twenty years and upwards, namely, that if the sheriff, by the illegal act of himself or his officers, has taken a person unlawfully into custody, so that the custody amounts to a false imprisonment, he cannot avail himself of that illegal detention, to execute against the body of the prisoner other writs which he holds at the suit of other plaintiffs.

In the present case the question is as to the propriety of the direction given by the Judge at the trial. Lord Denman told the jurors, in substance, that it was for them to decide whether the defendants, the sheriff, had been guilty of culpable neglect or breach of duty towards the plaintiffs (Lane and others) in having arrested Bacon under Arambura's supposed writ; and that if the defendants knew, or by reasonable care might have discovered, that Arambura's * writ was void, so that by arresting Bacon * 555 on that writ they would be arresting him under circumstances which would make it impossible that they should detain him on the plaintiffs' valid writ, that was culpable negligence and breach of duty towards the plaintiffs.

I concur, for the reasons which I have stated, with the Court below in the opinion that the direction so given correctly expounded the law, and consequently that the bill of exceptions cannot be maintained, and that judgment must be entered up for the defendants in error.

There is, however, one formal matter in which the judgment below is erroneous. On the plea of "not guilty" to the second breach the jury found for the defendants. The damages were properly assessed on the first breach only. Judgment was given for the plaintiffs accordingly to recover the sum so assessed, but no judgment was entered on the issue found for the defendants on the second breach. This, however, is immaterial as to the question whether a *venire de novo* ought to be awarded. The finding of the jury is sufficient to warrant the judgment given; but it ought to have been followed by a judgment, that, as to the breach of duty secondly complained of, the defendants should be discharged without a day. This, however, which is in truth mere matter of form, may be set right by your Lordships now directing

¹ Dyer, 244 b.

the record to be amended in that particular. I therefore move your Lordships that this be done, and that judgment be given for the defendants in error.

Mr. Dowdeswell. — On the part of the defendants in error, I have to apply to your Lordships to allow interest from the date of the judgment in the Court of Exchequer Chamber, pursuant to the Act of the 3 & 4 Wm. 4, c. 42.

* 556 * THE LORD CHANCELLOR. — You are entitled to that. Is it necessary for this House to make any order upon it? Can it not be done in the Court below? You are entitled to it either in this House or below.

Record amended, and judgment given for defendants in error.

Lords' Journals, 28th August, 1857.

BARLOW v. OSBORNE.

1858. February 11, 12.

EDWARD BARLOW, *Appellant*.

EDWARD COM OSBORNE and others, *Respondents*.

Opening Biddings. Public Auction. Private Sale. "Party."

The practice of opening biddings (which is one of doubtful advantage) is not applicable to a sale of property by private contract.

Property was directed to be sold by the Court of Chancery. The advertisement announcing the sale described it as a "sale by private contract." The sale was to be made subject to receiving the sanction of the Vice-Chancellor, and subject to certain conditions, among which were these: that persons intending to purchase were to send in sealed tenders, which would be opened by the chief clerk to the Vice-Chancellor, under whose order the sale was made; that the chief clerk, after the lapse of four days, would certify who was the purchaser; and that this certificate was "in due course to be signed and filed, and become binding without further notice or expense to the purchaser": —

Held (affirming the order of the Court below), that though this was described as a "sale by private contract," it had all the incidents of a sale by auction, and therefore that the practice of opening biddings might be applied to it.

Under the new practice introduced by the 15 & 16 Vict. c. 80, §§ 32, 33, 34, and the General Orders of the Court of Chancery of July, 1851, and (Nos. 49–51)

of October, 1852, the contract, in a sale of this kind, does not become absolutely binding until after a lapse of eight days from the filing of the certificate. Within that period an application may be made for an order to open the biddings.

Such application may be made by a person who is not a "party to the proceedings."

* A purchaser who has received back his deposit, under an order to open * 557 biddings, is not thereby precluded from objecting to such order.

Quære. Whether a sale by auction and a sale on sealed tenders can be considered as identical?

IN pursuance of orders of the Court of Chancery, dated 9th May, 1848, and 17th March, 1855, made in two causes then depending in that Court, certain freehold hereditaments situated near Withyham, in Sussex, were put up for sale by public auction, in one lot, on the 24th day of August, 1855, but there was no bidding equal to the reserved bidding.

Vice-Chancellor Stuart afterwards directed these premises to be offered for sale in one lot, by sealed tenders, in the form set forth in the advertisement hereinafter stated.

In consequence of such directions, an advertisement was on the 30th January, 1856, inserted in the newspapers, which, after describing the site of the property, went on thus:—

"To be sold by private contract, the above very valuable freehold estate, with," &c. "Persons desirous of competing for the said estate are hereby informed, that sealed tenders, addressed under cover to Robert William Peake, Esquire, the Chief Clerk of Vice-Chancellor Stuart, to whose Court the cause of *Osborne v. Foreman* is attached, and marked private, will be received at his chambers, No. 11 Old Square, Lincoln's Inn, London, up to and inclusive of Thursday, the 7th day of February, 1856, in the following form, and signed by the person or persons proposing to purchase the estate:—

"*Osborne v. Foreman.*

" 'I, or we, hereby agree to purchase, &c. subject to the conditions hereto annexed, and subject to this contract receiving the sanction of the Vice-Chancellor, to whose Court the cause of *Osborne v. Foreman* is attached.'

* "Such tenders will be treated as confidential, and their * 558 contents will not be made public.

"Friday, the 8th day of February, at eleven o'clock in the fore-

noon, at the said chambers, is appointed by the said Chief Clerk for adjudicating on the said tenders.

“ROBT. WM. PEAKE, Chief Clerk.”

The printed particulars and conditions of sale were in the following terms, viz.: “The sale is subject to a reserved bidding, which has been fixed by the Judge to whose Court these causes are attached. The Chief Clerk of the said Judge will proceed to certify the result on Friday, the 8th February, 1856, at eleven o’clock in the forenoon, at which time the bidders may, if they think fit, attend by their solicitors, at the chambers of the said Judge, at No. 12 Old Square, Lincoln’s Inn, in the county of Middlesex, or in person. The certificate of sale, if any, will then be settled, and will, in due course, be signed and filed, and become binding, without further notice or expense to the purchaser. The person who is allowed the purchaser is to pay the sum of 2000*l.*, by way of deposit, into the name of the Accountant-General of the Court, pursuant to an order to be obtained for that purpose by the vendors, on or before the 18th day of February, 1856, and which said order is to be peremptory, and shall be deemed to be duly served and delivered if left at the address of the said purchaser subscribed to his bidding.”

On the 7th February, 1856, the appellant made a tender for the purchase, complying with all the forms set forth in the advertisement, and offering the sum of 36,500*l.*

On the 8th February, 1856, the tenders (among which was one by Mr. Henry Heffill) were opened by the Chief Clerk of Vice-Chancellor Stuart, at his chambers; and as the bidding *559 of the appellant was the highest, and exceeded * the reserved bidding, he was certified by the Chief Clerk to be the purchaser, at the sum mentioned in his tender.

The certificate bore date the 8th day of February, 1856, and was framed in conformity with the conditions.

On the 13th February, 1856, the certificate was duly approved and signed by the said Vice-Chancellor, and was filed on that day.

On the 12th February a summons was obtained from the office of Vice-Chancellor Stuart to attend at his chambers on the 16th February, on the hearing of an application by Heffill, that on his paying Barlow’s costs of the bidding, and paying the sum of 1500*l.* into Court, the estate might be resold.

This summons was alleged to have been posted (directed to the appellant's residence in Staffordshire) on the day it was issued.

On the 18th February the appellant sold out the sum of 1400*l.* Consolidated Bank Annuities, amounting to the sum of 1261*l.* 12*s.* 6*d.*, together with 738*l.* 7*s.* 6*d.* in money, and paid the same into the Bank, in payment of the deposit of 2000*l.* in respect of the purchase.

The summons was heard in Court before the Vice-Chancellor on the 23d February, 1856, and the order to open the biddings was made. The estate was resold, and was finally purchased by Mr. Walter Prideaux for 44,000*l.*

The appellant appealed against the order, and the appeal came on to be heard before the Lords Justices on 8d March, 1856, when their Lordships did not think fit to make any order on the said application, except to direct the defendants in the original cause to pay to the appellant his costs of the application.

The present appeal was then brought.

* *The Attorney-General (Sir R. Bethell) and Mr. W. M. James (Mr. Baggallay was with them)* for the appellant. * 560

— The practice of opening biddings is one that was originally intended to prevent estates from being sold at a great undervalue. It has now become needless, since the introduction of that other practice of fixing a reserved price, and the greatest equity Judges have declared it to be mischievous. In *White v. Wilson*,¹ Lord Eldon expressly condemned it, and so did Lord Redesdale in *Fergus v. Gore*,² both learned Lords referring to the general complaint that estates sold under decrees of a Court of equity went at considerable undervalue, and expressing their belief that the cause of this was the trouble purchasers were put to in completing their purchases. This practice may now therefore be discussed upon principle. There is no principle to justify it. In private dealings the offer and the acceptance constitute a perfect contract, which is binding upon both the parties. In sales under the order of the Court of Chancery there is a modification introduced by the general orders of the Court; certain forms must be complied with, but that having been done, the contract is final, and the modification of the ordinary rule of sale and purchase cannot be extended

¹ 14 Ves. 151.

² 1 Sch. & L. 350.

beyond the words of those orders which introduce it. Here the printed conditions of sale, which must be taken to be in complete execution of the General Orders of the Court, were fully performed by the appellant, and a definitive contract must be taken to have been constituted. By those conditions the certificate of sale, when approved by the Judge, were "to become binding, without further trouble or expense to the purchaser." That certificate was * 561 on the 13th February signed by the Vice-Chancellor as * approved by him, and in that way the contract was rendered complete by the act of the Court itself.

Again: the practice has never been applied to a case of private contract. In *Millican v. Vanderplank*,¹ Vice-Chancellor Wood expressly so decided, and in that case it was also held that when the Master has, in the presence of the parties, approved of a sale by private contract, whether under a special reference or the fourth General Order of July, 1851,² no stranger can intervene to prevent the confirmation of the report. Here the sale was by private contract. The intervention was on the part of a stranger, and it was made after the Judge had signed his approval of the certificate which declared the appellant the purchaser, who had therefore a right to believe that he should not be subjected to the inconvenience of a sale by public auction.

In this case there was an undertaking on the part of the Court that the tenders should not be published; that undertaking could not have been performed, or the party applying could never have known what was the appellant's bidding, so as to be able to offer to exceed it. This breach of the conditions must have occurred after the certificate had been signed by the Chief Clerk, and allowed by the Judge, though the conditions expressly declared that the contract would then "become binding, without further notice or expense to the purchaser."

* 562 * The certificate of the sale was to be procured by the persons who had the conduct of the sale; they were to file

¹ 11 Hare, 136.

² "That when any property is directed to be sold before the Master, the Master shall be at liberty, either before or after such property shall have been put up to sale by private auction, to receive proposals for the sale thereof, or of any part thereof, by private contract, and he shall make his report thereof, with his opinion thereon, to the Court, which report shall be submitted to the Court for confirmation, in the same manner as reports made upon special reference as to sales by private contract."

it; the signing it is equivalent in the new practice, to the Master's report *nisi*, and the approval, to the confirmation of the Master's report: *Bridger v. Penfold*.¹ The contract here would have been binding on the purchaser: *Vesey v. Elwood*.² That was a very strong case, for the purchase was of an estate *pur autre vie*, and the sole *cestui que vie* died subsequently to the bidding, and before the Master's report could be confirmed. If under such circumstances the purchaser could be held bound, the vendor — that is, in this case, the Court — must be equally bound. Here the purchaser was bound to pay the deposit into Court before the 20th February; he did pay it in on the 18th. It cannot be contended that this payment was obligatory on him, and yet that the Court might on the 21st February direct a resale of the property.

The course adopted here was erroneous, for no order was carried in to discharge the purchaser; without such an order there cannot be a resale.

It may be suggested that the appellant cannot now object to the order, as he has received back his deposit.

[THE LORD CHANCELLOR. — There is nothing in that.]

The error of the Court below appears to have arisen from treating this as a sale by auction, and misconstruing the words in the third condition, that the certificate "will, in due course, become binding." Lord Justice Turner referred³ to the 15 & 16 Vict. c. 80, for the means of construing these words, and held that four days, after the Clerk had signed the certificate, were allowed to take the opinion of the Judge at chambers, and that "eight days more were, by the fifty-first Order, allowed for parties to come into Court to *disturb the certificate." But even if * 563 that construction was right, it was applicable, not to a stranger, but only to the parties, that is, parties to the proceeding. The 34th section of the statute is restricted to them; the words are, that the certificate, when signed, adopted, and filed, "shall thenceforth be binding on all the parties to the proceedings"; and the word used in the forty-ninth Order is "party," and not "person." Here the parties did not impeach the sale; it was a stranger, one who had previously bidden a much less sum. The construction put by the Court below upon the words of the condition cannot be applied in his favour.

¹ 1 Kay & J. 28.

² 3 Drury & War. 74.

³ In *Osborne v. Foreman*, 25 Law J. N. S. Ch. 341.

Mr. Craig and *Mr. Batten* for the respondents. — A sale by order of the Court of Chancery is not a sale coming within the provisions of the Statute of Frauds, *The Attorney-General v. Day*,¹ but is governed entirely by the orders and practice of the Court. The purchaser signs his name to the contract; no person signs on the part of the vendor, and therefore he is not bound until the final order confirming the sale has been made by the Court. The right and duty of the Court to have a better purchaser than at first offers, apply equally to sales by auction and by private contract; and there is no such distinction as is supposed to be laid down in *Millican v. Vanderplank*,² which was a case decided entirely on its own peculiar circumstances. But even if such a distinction exists, this case cannot be considered as one of a sale by private contract.

Though called by that name in the advertisement, it had all the incidents of a sale by auction, and the proceeding here was therefore perfectly competent. The Court carefully guarded itself here against being finally bound by the first accepted bidding.

* 564 “To be sold by private contract,” meant only that * the estate was to be sold upon tenders, and that till the purchaser was first declared in the clerk’s certificate the tenders should be confidential, while the words “subject to this contract receiving the sanction of the Vice-Chancellor,” constituted an express reservation of the power to declare that sanction in the formal and settled manner of the Court. That is perfectly well known, and the purchaser must be taken to have purchased subject to that knowledge. The words “in due course” cannot be restricted to “signed” alone, but cover the words “signed,” “filed,” and “become binding.” If so, then it is clear that the last words could not take effect till after the expiration of the eight days from the filing, when, no summons having been taken out, the certificate would become binding.

The principle on which the Court proceeds in ordering resales is stated by Lord Eldon in *Lefroy v. Lefroy*³ to be “the advantage of the parties interested in the sale”; and consequently there can be no difference whether the application to open the biddings is made by a stranger or not; and there the biddings were opened on the application of a person who had been present at the sale. The

¹ 1 Vez. Sen. 221, per Lord Hardwicke.

² 2 Russ. 606.

³ 11 Hare, 136.

cases of *White v. Wilson*¹ and *Fergus v. Gore*² are cases in which the report had been absolutely confirmed; and there, of course, nothing short of fraud could be put forward as a ground to open the biddings.

Formerly the terms of a decree were, that the estate should be sold with the approbation of the Master. The seventy-fifth Order of 1828³ allowed "the Master to direct the same to be sold in the country, at such place and by such person as he shall think fit." Then came the Orders of July, 1851, by the second of which the Master had authority * to fix reserved biddings. That * 565 Order made a rule of practice of what had before been the subject of a special direction: *Jervoise v. Clarke*.⁴ The fourth Order of July, 1851, authorised the Master, "before or after such property shall have been put up to sale by public auction, to receive proposals for the sale by private contract." Those proposals must be such as would come from strangers as well as parties to the cause, and the adoption of them must be confirmed in the same way as a sale by public auction. The present practice is regulated by the 15 & 16 Vict. c. 80. The 32d section directs the Chief Clerk to embody the result of the proceedings before him in the form of a short certificate; the 33d reserves leave to "any party," which must mean any person, to take the opinion of the Judge upon it; and the 34th shows that that opinion may be taken after the certificate has been signed and adopted by the Judge. The Judge was substituted for the Master, the certificate for the report, and the filing of it was to have the effect of the former order *nisi*. If not impeached, it would at the end of a certain number of days become absolute. The 49th and the 51st Orders of October, 1852, show the proceedings here to be perfectly regular.

There is no necessity actually to discharge the first order; that and the order for resale may for a time stand together; such has always been the practice. Notice of the application to the Judge is all that is necessary.

The payment of the money on the 20th could make no difference. The purchaser had had an indulgence in the payment of the deposit being delayed till that day. The contract could not become finally binding till the 22d of February. The

¹ 14 Ves. 151.

² 1 Jac. & W. 389.

³ 1 Sch. & L. 350.

⁴ Toulmin's Statutes and Orders, p. 242; Sanders's Orders in Ch. 728.

order was an act of judicial discretion, which is not properly the subject of appeal.

* 566 * *The Attorney-General*, in reply. — This is a sale by private contract, and in such a sale the contract becomes complete and binding as soon as it has been signed: the signature of the approval by the Judge left nothing more to be done; and the attempt to open the biddings here is really to set aside a completed contract, without an imputation of either mistake or fraud.

February 12.

THE LORD CHANCELLOR (LORD CRANWORTH). — My Lords, this case, which has been very fully argued, is upon a very short, but very important point. It has reference to a question which has been often mooted and discussed in the Court of Chancery, namely, the practice of opening biddings. Your Lordships are well aware what that practice is, namely, that in the case of estates which are put up for sale in the ordinary mode by auction, by direction of the Court of Chancery, until there has been a final order (whatever that final order is) establishing a particular person to be the purchaser, a third person may, generally speaking, intervene; and upon no other ground than that he offers an advance of price, provided it be a considerable advance, the sale may be set aside, and he, paying all the expenses which the previous purchaser has incurred, gets an order that the estate shall be put up for sale upon his advanced price. My notion of the practice had been that he was then bound to bid to the extent of his advance upon the former purchase. It seems, however, according to the authorities, that that has at all events not been always done, but that was the principle upon which the Court acted.

Now, no one can look at that practice without deploring it, and without seeing that it is a practice which upon theory must lead, and which according to experience constantly has led, to

* 567 the greatest inconvenience; I do not say * injustice, because supposing persons, who are tendering money as purchasers, to know what the rules of the Court are, which we must, I suppose, presume they do, then it is not unjust to them that they are dealt with in respect of their purchases according to those rules. But it is most inexpedient, because with reference to the interests, not of the purchaser, but of the seller, it is obvious that the

knowledge, when I am bidding for an estate, that I may, within a week or a fortnight, or perhaps a month or two months afterwards be deprived of that for which I had perhaps a sort of enthusiasm at the moment when I became the purchaser, must necessarily damp my ardour, and I therefore do not give that which I otherwise might have given. Sometimes it may happen that what is thus lost is more than compensated for by the additional publicity which is given to the proceeding, by which additional purchasers may be invited into the field. But all these discussions, as it has been fairly admitted by the counsel on both sides of the bar, are discussions which may be rather addressed to your Lordships in your legislative capacity, or perhaps in some respects to the individual who has now the honour of addressing you as head of the Court of Chancery, with a view to see whether or not some amendment may be made in this practice. The question we have to deal with here is, what are the rights of the parties with reference to the existing practice?

Now, the Attorney-General suggested a consideration, which, whether he is right in the view he takes of the origin of the rule or not, does appear to me to afford a very good ground for amending the order of the Court, namely, the altered practice which now prevails of having reserved biddings; because unquestionably, even if the original practice was right, of the Court having this power of opening the biddings for the purpose of preventing sales at an *undervalue, it does seem rather un- * 568 reasonable that the vendor should be, as it were, protected at both ends, not only by the reserved bidding, but by the power of putting an end to the purchase after it has been made; and it does appear to me to be a very useful suggestion, whether a general order might not be made, either that there should always be a reserved bidding, or, if not, that whenever there is a reserved bidding, then, upon the mere ground of advance of price, no bidding shall ever be afterwards opened. That, however, though it may be very useful to enact hereafter, is not the law at present.

My Lords, the first point is, what is the law at present with reference to sales by auction properly so called, the ordinary sales under the direction of the Court; and what is the rule with reference to the altered practice? Now, I do not weary your Lordships by repeating that which has been stated at the bar in the course of this argument — what the course was as to, first, a bid-

ding, then obtaining the Master's report as to a particular person being the best purchaser, and then getting that report absolutely confirmed ; and till it was absolutely confirmed, upon an advance being made, the biddings might be opened. How is that altered by the altered practice ? I think that has been put upon a perfectly proper ground in the case of *Bridger v. Penfold*, before Vice-Chancellor Wood¹ in the year 1853. Instead of obtaining a report *nisi*, and getting that report confirmed, with an opportunity to all the public, until it was confirmed, of opening the biddings that practice has now been brought within the ordinary range of proceedings before the Chief Clerk of the Judge ; and according to the construction of sections 33 and 34 of the Masters Abolition Act, and the Orders that were made in *569 *1852 to carry into effect the directions of the statute passed in the session of that year, the course of proceeding is as follows : The proceeding is brought before the Chief Clerk of the Judge ; it is discussed, and at the end of four clear days, he certifies who is the purchaser. That, Vice-Chancellor Wood determined, and I think quite correctly determined, must be taken to have been meant to be in analogy to what was formerly the practice of obtaining a report *nisi*.

Then that having been done, the thirty-fourth section says that when any certificate or report shall have been signed or adopted, the certificate so made by the Chief Clerk at the end of four clear days may be, and in ordinary practice it always is, unless there is some intermediate application to vary it, signed and approved by the Vice-Chancellor, and that " when any such certificate or report of the Chief Clerk shall have been signed and adopted by the Judge, the same shall be filed in like manner as reports are now filed." That is not exactly analogous to the former proceeding, because the report, according to the old practice, was not filed until it had become absolute. That certainly is not meant to be the case here, because the certificate, after it has been signed, is to be filed. It says, " in like manner as reports are now filed," — that is, as absolutely confirmed reports are now filed, " and shall thenceforth be binding on all parties to the proceeding," not the parties in the cause, but " the parties to the proceeding, unless discharged or varied either at chambers or in open court, according to the nature of the case, upon application, by summons or mo-

¹ 1 Kay & J. 28.

tion, within such time as shall be prescribed in that behalf by any general order of the Lord Chancellor."

The forty-ninth general Order of October, 1852, says, "At the expiration of four clear days after the certificate or report shall have been signed by the Chief Clerk, if no party has in the mean time obtained a summons to take the opinion * of the Judge * 570 thereon," the certificate may be approved. Vice-Chancellor Wood, in the case of *Bridger v. Penfold*, considered that by the signature of the Judge first given to the Clerk's certificate the parties to the proceeding were put in the same situation as they would have been according to the old practice upon obtaining the report *nisi*, and this order assumes that to be so. Then the fifty-first Order says: "The time within which an application may be made by summons or motion to discharge or vary any certificate or report which has been signed and adopted by the Judge sitting in chambers is to be eight clear days after the filing of such certificate or report." Eight clear days; that is the time which in obedience to the directions of the thirty-fourth section of the Act, the Lord Chancellor fixed as the time within which parties to the proceeding might apply to have the certificate varied. Vice-Chancellor Wood in that case determined that within that period it was open and competent to a party to make that application, and that, just as according to the old proceeding he might, within that time, have applied to open the biddings, so he may now make the application to the Judge within that same period of time, which under these Orders is given evidently by analogy to the old practice.

I consider it therefore to be quite clear, that according to the existing law and the altered practice (altered in conformity with the Act of Parliament), upon an ordinary sale by auction, under the direction of the Court, the course is plain, that the purchaser obtains the certificate of the Chief Clerk that he is the purchaser, and within four days he obtains the approbation of the Judge, unless there is something in the mean time to prevent his obtaining that approbation; and that in the succeeding eight days he has exactly the same rights, and that third persons have exactly * the same rights (for I consider that all persons who wish * 571 to become purchasers are, within the fair construction of this clause, to be regarded as parties to the proceeding); they have the same rights, that existed before, of opening the biddings, and so of improving, as was supposed, the interests of those who

were selling the estates. That would be the case upon an ordinary sale. And the great question here is, whether this sale, differing in some respects from an ordinary sale, does so differ as to create any difference in respect of the rights of the parties in the cause, the public, and the intended purchaser, with reference to the opening of these biddings.

Upon that point, I confess, that after having had some fluctuation of opinion upon that subject, I have come to the conclusion that there is no difference whatever in principle. Observe, there had been attempts, which we need not advert to, in preceding years to sell this estate by auction. For some reason or other the estates were not sold, and it appears that Vice-Chancellor Stuart thought that some altered mode of proceeding would be better. He consequently adopted this mode; whether it is the usual mode or not, I am not aware; I do not recollect an instance of a sale in this way; but it may be that it is a common mode of proceeding. It was this. [His Lordship stated the circumstances.]

Now what sort of sale was this? It is described as a sale by "private contract," but we must not make ourselves, or consider that other persons can properly be made, the slaves of words. That which is called a sale by private contract is, when you look at the description of what are the things to be done, to all intents and purposes a sale by auction. I believe the word auction has been always understood to be derived from *augendo*; it means

that you are to bid. This is not exactly a sale by auction *572 in this *sense, that when I hear that A. has bid 10,000*l.*, I make an advance upon it, and say I will give 11,000*l.*, but it is a sale at which everybody is privately to communicate what he will give, and then if a sufficient sum has been offered upon a certain day, he who has offered the most is to be declared the purchaser. That is the nature of the sale.

That was done, and Mr. Barlow, the appellant, was the person who offered in his sealed tender the highest sum, namely, 36,500*l.* How does he make his offer? What is the form in which he is told to make the offer? "I hereby agree to purchase the estate," so and so, "at the price or sum of" and he puts 36,500*l.*, "subject to the conditions hereby annexed" and "subject to this contract receiving the sanction of the Vice-Chancellor." What does that mean? I think it means, subject to the contract being confirmed by the Vice-Chancellor; that must be by the Court of

Chancery, *secundum cursum curiæ*, unless some specific mode of obtaining the approval is pointed out. When it is said that the sale is to be subject to the sanction of the Vice-Chancellor, that means, subject to the legal sanction of the Vice-Chancellor, in such mode and form as such sanction is, by the ordinary course of the Court, to be given, and I think that is very much confirmed by the conditions of sale, which state that "the certificate of sale, if any, will then" that is, upon the opening of the tenders on the 8th of February, "be settled, and will in due course be signed and filed and become binding, without further notice or expense to the purchaser." I thought at one time that those words "without further notice or expense to the purchaser" might have been important, because they might point to some different mode of sale from that which would have been the ordinary course; but that is not so. According to the old practice, after the purchaser had made his tender, and had been reported to have made the * highest tender, he was at some expense, because he was * 573 the person who was to obtain the Master's report; he was the person who was to get the report made absolute; and he was the person who was to file that report. But according to the altered practice, all the expense is thrown upon the parties to the cause; therefore it was very reasonable to intimate to the person making that tender that the certificate would, in due course, be signed and filed and become binding without any further expense to him. That view of the case is still further confirmed by the fourth condition of the sale, which says that the "vendors are within eight days after the certificate has become binding to deliver," and so on. Now, according to the altered practice of the Court, the certificate becomes binding, not when the Vice-Chancellor signs it, but eight days after the Vice-Chancellor signs it, unless there is something in the mean time to interfere to prevent that result.

It appears to me, therefore, that that was a proceeding in the ordinary course of the Court, so that the ordinary mode of making purchases absolute upon ordinary sales by auction became applicable to it, and consequently that the course that was taken in this case was perfectly right, and that Mr. Barlow, who had been the purchaser at the sale, lost his right to have the sale completed by reason of the intervention of a third person between his bidding and the confirmation of the certificate, its becoming absolutely

binding, namely, by reason of the intervention of Mr. Heffill in the mean time making a larger offer.

This being the view I take of the case, it does not appear to me to be necessary to consider what is the rule with reference to purchasers by private contract. But as far as it is fit to express any opinion, I must say that, with regard to sales by private contract,

I do not see how the question ever can arise about opening * 574 biddings, because a sale by * private contract is completed at once. There is a proposal ; it is thought advantageous ; and the Master or the Chief Clerk concurs that instead of the property being put up to sale, a particular person shall be allowed to purchase it for a particular sum. When that is once done a special order is made for the occasion, and the question of opening the biddings does not seem to me to be one that can ever, upon such a state of things, arise. It is, however, unnecessary to give any opinion upon that subject, because the ground upon which I go is this ; that according to the altered practice of the Court it was competent here to open the biddings at any time before the expiration of eight days after the signing of the certificate by the Vice-Chancellor ; that is, such a proceeding is competent in the case of ordinary sales by auction, and this particular sale, though not an ordinary sale by auction, is a sale of a character which must be dealt with as having the incidents of such a sale, and that, consequently, these proceedings have been correct. Therefore, I humbly move your Lordships that this appeal be dismissed.

LORD BROUGHAM. — My Lords, I do not mean to offer any opposition to my noble and learned friend's motion. Upon the whole, though with considerable difficulty and after very considerable doubt, I have come to the opinion that we ought not to alter the judgment appealed from.

Much depends in this case upon the practice of the Court of Chancery before the new orders ; I mean the old practice referred to by Vice-Chancellor Wood in *Bridger v. Penfold*.¹ I say nothing of what passed in *Millican v. Vanderplank*,² because I think * 575 it is admitted upon all * hands, that that does not apply to this case. But the observations of the Vice-Chancellor in *Bridger v. Penfold* appear to me exceedingly strong, and very im-

¹ 1 Kay & J. 28.

² 11 Hare, 136.

portant, with respect to the former practice of the Court. And I import those observations into this case, as the learned Judges below appear to have done, with respect to the manner in which we are to deal with a case arising under the new rules.

My Lords, I do not quite go along with my noble and learned friend, but that is very immaterial, in his view of the other part of the case, I do not quite go along with him in regarding "auction" and "sealed tenders" as more or less identical. I should say, upon the whole, with all possible respect to my noble and learned friend's opinion, that I should rather be disposed to consider "sealed tenders" and "auction" as things not only not identical, but rather contrasted the one with the other. But I do not think much turns upon that. As I have already stated, I have had some considerable doubts, which doubts have been, I will not say entirely removed, but very much weakened by what has passed. But even if those doubts had continued, I should not have been prepared upon this question of practice to have advised your Lordships to reverse the judgment of three of the learned Judges in the Court below upon this matter.

As to what has been said upon what ought to be the rule and the practice in this matter, I lay that upon one side, for the reason given by my noble and learned friend, that that would be a very good argument in a case where the matter was exceedingly doubtful, and where you had no guide by which to construe a given order or a given provision of the statute. You would then properly rely upon those topics which have been pressed upon us; and which would be exceedingly powerful in a case where the balance was entirely doubtful, in casting it on one side * rather than the other. That I do not apprehend to be *576 this case. Those are topics which we could only take into our view if we were legislating upon the subject, either making a new provision in the Act of Parliament, or under the powers of that Act making a new Order of Court upon the subject.

LORD WENSLEYDALE. — My Lords, in this case I concur in the result of the opinions of both my noble and learned friends who have preceded me, and in the observations made by my noble and learned friend the Lord Chancellor upon this case. I concur also in the observations which have been made as to the propriety of putting a stop to the practice which has prevailed in the Court of

Chancery of opening biddings. I am quite alive to the observations which have been made against that practice, and I hope that occasion will be taken either by Act of Parliament, if necessary, or at least by order of the Court, entirely to put a stop to it.

The question is, whether in this proceeding it was competent to the parties to apply to the Court to open the biddings. Now that I think depends upon two questions. In the first place—what is the present practice of the Court of Chancery under the Statute 15 & 16 Vict. c. 80, and the rules made under that statute with respect to what is clearly and notoriously a sale by auction. A sale by auction I take to be a sale in which one party knows what another bids, and increases upon the other's bidding, by offering on his own part. It is disputed by the Attorney-General whether under the particular contract entered into upon this sale, this is a case in which the biddings could be opened; and he disputes also whether in a sale by auction it would be, under this particular contract, in the power of the Court to allow the opening of the biddings.

* 577 *The first question therefore to be disposed of will be what, in a regular sale by auction, (which this is not I think) is now the practice of the Court of Chancery? I take it as now established by the case of *Bridger v. Penfold* before Vice-Chancellor Wood, that the present practice with respect to sales by auction is the same as the old practice with regard to such sales, putting the certificate, after it has been signed and filed, and after a lapse of eight days, upon the same footing as the report of the Master absolutely confirmed. I think that is the correct view of the case, and that the rule of the Court of Chancery (the 32d Rule), founded upon the Act of Parliament, which, after a certificate has been filed enables parties within eight days to apply to alter it, really applies to this case, where a third person in the interest of the parties selling the estate applies to have it altered. That is the opinion which is given by Vice-Chancellor Wood in the case of *Bridger v. Penfold*, and I apprehend that opinion is perfectly well founded.

Then the next question will be, whether this falls under the description of a sale by auction, or under the description of a sale by private contract. I agree entirely with the observations made by Vice-Chancellor Wood in the case of *Millican v. Vanderplank*, that the usual opportunity of opening the biddings does not apply

to a contract of the description that existed in that case. That was a private contract entirely. That was a bargain made by two persons, which they brought before the Master, and the Master confirmed that bargain. That was a case in which I think the doctrine of opening the biddings could not possibly be applicable. The reasons given by Vice-Chancellor Wood seem to me upon that subject to be perfectly satisfactory, because in a private contract the parties intend to make it a final contract. But if the contract is to be by biddings, pursuant to the practice of the Court of Chancery, every one who bids * knows that that is not to be * 578 a final and binding contract. It is open, according to the usual practice of the Court, to alteration if a better bidder comes forward.

Now the question is, whether the present case falls under the latter class of sales by private contract, or whether it is really in the nature of a sale by public auction, so as to make it competent, according to the practice of the Court, to persons to apply to open the biddings within eight days. That I think depends upon the actual contract made in this case upon the advertisement, and the tender made in pursuance of that advertisement.

Here the advertisement certainly states that there is "to be sold by private contract a very valuable freehold estate," and then it states afterwards that the tenders for this property are to be marked "private," that they are to be sent in by a certain time, before the 7th of February, and that the person tendering is to agree to purchase at the price mentioned by him, and to be subject to the conditions thereto annexed, and subject to the contract receiving the sanction of the Vice-Chancellor. Then it goes on to state that such tenders will be treated as confidential and their contents will not be made public.

Now it struck me certainly in the course of the argument that a good deal might depend upon the meaning of those words, if they were to be taken as intending to say that the party bidding should never have his contract disclosed so as to prevent any other person advancing more upon his bidding, and then afterwards coming in to open the bidding. But I think the true meaning of these conditions is, that this is not a sale by private contract in the sense of being in the nature of a binding contract between the parties, and that the secrecy here spoken of is a secrecy to be preserved till the last moment before the tenders are opened, so that no one

*579 shall know before then what another person has *bid, so as to be able to advance beyond the sum which has been tendered ; but when the tenders have been received and the certificate has been signed and filed, any person may have access to the certificate, and may know what the largest sum tendered is. Then the question is, whether there is anything in this contract to prevent a person when he knows what the sum is, the certificate being filed in the office, applying in the usual course, according to the ordinary proceeding of the Court, to open the biddings within a certain time. I think it does not exclude that power on the part of persons who choose to come in afterwards, but in the mean time, and until the last moment, the transaction is to be kept secret ; no one shall know what is bid so as to be able to advance beyond that bid ; but when the certificate has been filed, all people who choose to consult the files of the Court of Chancery, may come and know what the bidding is. That I think completely explains the meaning of the words "undertaking to keep the tender secret."

What then is to be done after the certificate has been filed ? Then there is nothing to exclude, unless the terms of the contract itself exclude it, the power which everybody has of applying, in the interest of the parties, to increase the price by opening the biddings. Now is that excluded by the subsequent terms contained in the advertisement ? I think not ; that depends very much upon the grammatical construction of what follows afterwards : "The Chief Clerk of the said Judge," [his Lordship read the condition, *see ante*, p. 558.]

Now what is the meaning of that ? Either those words may refer to what immediately follows, or they may refer to the whole of what follows. What is that ? "The certificate will then be settled, and will in due course be signed and filed and become binding, without further notice or expense to the purchaser." Now I do not agree in the observation *that was made upon the grammatical construction of the sentence by the Attorney-General as to the words "signed and filed." It appears to me that, according to the fair construction of the sentence, it means that the certificate will be settled, and be signed, and filed, and become binding, in due course ; that is to say, in due course of the Court of Chancery in such a proceeding. It refers, I think, to that due course, and that due course is to be

followed. Therefore in this respect I take the view which has been already taken by Lord Justice Turner in construing this advertisement, that it leaves this open to all the usual practice which prevailed before and which prevails still with respect to sales by public auction.

I am of opinion, therefore, upon these grounds that this appeal ought to be dismissed. I think the practice is clearly to substitute the filing of the certificate and the lapse of eight days afterwards for the whole process of the confirmation of the Master's report. That unquestionably applies now to all sales by public auction. And I think, taking the terms of this sale into consideration, it is to be regarded as a sale, not by private contract in the sense in which private contract dispenses with this matter and is binding by itself, but as a sale by public auction, with regard to which the usual course of the Court of Chancery in cases of sales by auction is to prevail.

Mr. Craig. — I do not know whether your Lordships would think it right that the respondents' costs should be costs in the cause.

LORD CHANCELLOR. — The respondents are the parties interested in the estate ?

Mr. Craig. — Yes, my Lord ; there are a great many parties among whom the fund is now to be divided.

THE LORD CHANCELLOR. — I think that your costs should come out of the fund.

* *Mr. Craig.* — Perhaps your Lordships will be pleased to * 581 add that to the order.

Orders affirmed. Appeal dismissed ; the costs to come out of the fund.

Lords' Journals, February 12th, 1858.

SHAW v. NEALE.

1858. March 12, 15, 16.

GEORGE SHAW, *Appellant*.JAMES NEALE and FREDERICK WILLIAM REMNANT, *Respondents*.¹

Lien of Attorney. Rule of Court. Registration of Judgment. 1 & 2 Vict. c. 110. 2 & 3 Vict. c. 11. Attorney, Solicitor, and Client.

A rule for taxation of costs, and an *allocatur* thereon, do not amount to a "rule" or "order" within the meaning of the 1 & 2 Vict. c. 110, § 18, so as to be capable of being registered as a judgment. The rule absolute for payment of the costs does come within the enactment.

There is no obligation on an attorney or solicitor to produce his client for the purpose of being served with process by a third person, and a security obtained by the solicitor from his client during the period of the client's concealment will not be thereby avoided in favour of such third person.

An attorney or solicitor has no lien on an estate recovered for a client in respect of the costs and expenses incurred in recovering it (*Barnesley v. Powell*, *Ambl.* 102, overruled). He has a lien only on the papers in his hands.

An attorney held an assignment of two terms to attend the inheritance of an estate recovered by him for his client. On a rule being made to tax his costs, it was part of the rule that the Master should decide whether, and if so, upon what terms, the attorney should execute to his client assignments of these terms. The Master having made his *allocatur*, directed that the attorney should, on payment of what was due, or on security for the same being given to his (the Master's) satisfaction, execute assignments of these terms at the cost of the client:—

Held, that this did not constitute a charge on the estate so as to give the attorney a priority from the date of the *allocatur*; for that the Master had no power to direct that these terms should stand as a security for the amount of the costs.

Under the 2 & 3 Vict. c. 11, if A. has a judgment registered under the 1 & 2 Vict. c. 110, such registration will protect him against all who become mortgagees or purchasers during the currency of the five years, and such protection will continue as to them under * a re-registration, even though

* 582 he should have omitted to re-register within five years; but as to persons becoming mortgagees or purchasers between the period when his first registration ceased and when his re-registration began, he will not be protected, but they will have priority over him (*Beavan v. Lord Oxford*, 6 De G., M. & G. 492, approved).

An indenture was executed by N. to R., at that time N.'s attorney, to secure what was then due to R., and also future advances. This indenture was made

¹ *Hopkinson v. Rolt*, 9 H. L. Cas. 521.

a first charge on N.'s property. S., who had previously been N.'s attorney, obtained against N. a rule absolute for payment of costs found due on the Master's *allocatur*; he registered this rule, and thus became a second encumbrancer. R. then became largely N.'s creditor for costs subsequently incurred:—

Held, on an order allowing S. to redeem R., that these subsequent costs could not be taken into the account.

THIS was an appeal against a decree made by the Master of the Rolls, relating to the priority of a judgment debt to which the appellant was entitled over certain mortgage debts and securities in which the respondent, Remnant, claimed an interest.

In February, 1836, James Neale, now deceased, the father of the respondent Neale, applied to the appellant, an attorney and solicitor at Billericay, to undertake the prosecution of a claim advanced by Neale, as heir at law of one Seth Sewell, to certain lands and hereditaments situate at Ulverston, in the county of Lancaster, then in the possession of two persons named Postlethwaite, as devisees under Sewell's will. Shaw, as the attorney for Neale, brought an action of ejectment and obtained a verdict at the Summer Assizes of 1836. In Easter term, 1836, Shaw, as solicitor for Neale, filed a bill in Chancery against the two Postlethwaites, for an account, and to obtain possession of the title deeds; and by an order of the Court of Chancery, made on the 25th November, 1836, they were directed to bring the deeds into Court, which was accordingly done.

* By an indenture dated 5th January, 1837, the premises * 583 in dispute were assigned to the appellant, his executors, &c. for the residue of two terms of 1000 years each, upon trust for Neale, his heirs, &c. and to attend the inheritance.¹

Shaw's bill of costs against Neale, in respect of the suit, amounted to 220*l.* 12*s.* 5*d.*

On the 8th August, 1837, an agreement was entered into between and by Neale and the two Postlethwaites, by which the litigation between them was brought to an end by compromise. Each party was to keep what he had got: Messrs. Postlethwaite, the personalty, and the mesne profits up to that time, the heir at law, Neale, the realty, and they were to convey to him their interest in

¹ An argument was attempted to be raised in favour of the appellant, founded on this assignment. It is sufficiently noticed in the judgment (see post, and see also 8 & 9 Vict. c. 112).

it. All deeds and documents relating to the real estate were to be given up to Neale.

In September, 1837, the premises recovered by Neale were offered by him for sale by auction at Ulverstone aforesaid, in six lots; lot 5 of which was sold to Richard Brunton for 279*l*.

In February, 1838, Neale withdrew his business from Shaw, and appointed Remnant his attorney and solicitor; and application was then made to Shaw for his bills of costs. They were delivered in, and on the 14th June, 1838, an order was obtained to tax them. At the same time a petition was presented in Chancery for Shaw to deliver up Neale's papers. This petition was dismissed with costs, and the order dismissing it was, in June, 1839, registered in the Court of Common Pleas, pursuant to the 1 & 2 Vict. c. 110,

but was never afterwards re-registered. The costs due to *584 Shaw on this dismissed petition were taxed, * and 25*l*. 14*s*.

remained unpaid. The taxation of the other costs was not completed until 11th April, 1839, when the Master finally allowed the sum of 1238*l*. 2*s*. 3*d*. The rule to tax, and the *allocatur* thereon, were on the 16th April, 1839, registered by Shaw in the Court of Common Pleas, pursuant to the 1 & 2 Vict. c. 110, and were re-registered on the 30th November, 1846, and again 30th November, 1852.¹

Before the taxation was concluded, namely, on the 7th March, 1839, Remnant obtained from Neale a warrant of attorney to confess judgment for 1000*l*. as security for 500*l*. and interest. Judgment was entered up thereon on the same day, and was registered on the 5th June in that year, under 1 & 2 Vict. c. 110, and re-registered 4th June, 1844, 5th June, 1849, and 3d June, 1854.

¹ As some argument was raised on the form of words used in the order to tax and on the Master's *allocatur*, it has been deemed necessary to make the following extracts from those documents: "It is further ordered that the said George Shaw shall give up to the plaintiff all deeds, &c. in his custody or power belonging to the plaintiff, on payment to him, Shaw, of what, if any, shall appear on the said taxation to be due to him from the plaintiff, or upon the plaintiff giving personal security, either by bills or bond, for what may be found due to Shaw, to the satisfaction of the Master, who shall have power also to decide whether Shaw shall execute assignments of the terms to the plaintiff's appointee, and at whose expense the said assignments shall be prepared and executed."

The Master by his *allocatur* allowed 1238*l*. 2*s*. 3*d*. as the final balance due to Shaw, and directed "that upon payment of the sum allowed, or upon security to be given to my satisfaction, the said George Shaw shall execute assignments of the terms to the plaintiff's appointee, at the expense of the plaintiff."

On the 12th June, 1839, Neal executed to Remnant a conveyance of all premises for securing to Remnant 647*l.* then due, and also "all future advances" to be made by him to Neale, not exceeding 1000*l.*

On the 16th April, 1840, Remnant obtained from Neale * an equitable charge on the premises for securing the sum * 585 of 1027*l.* 8*s.* 5*d.*, with interest; and on the 23d November in that year, Remnant obtained from Neale another warrant of attorney to confess a judgment in the Court of Exchequer for the sum of 1000*l.*, and thereupon a judgment was on the next day entered up, and an *elegit* issued, which was executed by the Sheriff of Lancaster, who, as it was alleged, delivered possession of the premises to Remnant. This judgment was registered under the 1 & 2 Vict. c. 110, on the 24th November, 1840, re-registered on the 24th November, 1845, and again on the 25th November, 1850.

On the 22d January, 1841, Remnant obtained from Neale another equitable charge on the premises for securing the sum of 1228*l.*, with interest; and on the same day Remnant obtained from Neale a deed of confirmation of the indenture of mortgage of the 12th June, 1839. The principal consideration for these charges consisted of Remnant's untaxed bills of costs. Shaw alleged that after the Master had made his *allocatur* for the sum of 1238*l.* 2*s.* 3*d.*, Neale, by the contrivance, and at the suggestion of Remnant, continually shifted his residence, so that service of the *allocatur* could not be made upon him; but at length, on the 11th November, 1840, service of the *allocatur* was made on Neale, and payment demanded; and on the 28th January, 1841, a rule for payment thereof was made absolute, which rule absolute was on the 30th of that month registered as a judgment under the provisions of 1 & 2 Vict. c. 110, re-registered on the 30th November, 1846, and again on 30th November, 1852.

On the 8th January, 1844, Remnant obtained from Neale a conveyance of all his remaining estate and interests in the premises, upon trusts for sale for securing the sum of 1796*l.*, with interest.

* Brunton, the purchaser of lot five, having in 1846, * 586 obtained against Neale a decree for specific performance, assigned to Shaw, in July, 1851, all his right and interest under the contract, and constituted Shaw his attorney to enforce completion thereof.

James Neale (the father) died on the 25th January, 1853, leaving the respondent, James Neale, his only son and heir at law, him surviving, having made a will, dated 8th January, 1844, whereby he devised and bequeathed all his property to his son.

This will (of which the son and the Rev. T. Turner were appointed executors) had never been proved.

On the 31st January, 1853, Shaw exhibited his bill (which was afterwards amended) in the Court of Chancery against the respondent, James Neale, Thomas Turner, and Frederick William Remnant; and after stating the matters before set forth, prayed that it might be declared that he had a lien for the sum of 1238*l.* 2*s.* 3*d.*, and interest, upon the terms of one thousand years each, and on the indenture of the 5th January, 1837, and upon the hereditaments recovered in ejectment, and upon the purchase monies of such parts thereof as had been contracted to be sold in case the said contracts should be completed, and upon all the title deeds, documents, and papers relating to the hereditaments, and deposited as aforesaid; and that the appellant, by virtue of the *allocatur*, the rule of the Court of Queen's Bench, and the order of the Court of Chancery so registered as aforesaid, had a charge in respect of the 1238*l.* 2*s.* 3*d.*, and interest, and the sum of 25*l.* 14*s.*, and interest, upon all the hereditaments and premises of Neale, deceased, and upon such purchase money as aforesaid; and that the appellant in respect of such lien and charge was entitled to a priority

and preference to the judgment and encumbrances on the *587 same premises obtained by Remnant. Second, * that he might be confirmed the purchaser of the lot No. 5, at the price of 279*l.*, and might be at liberty to retain the purchase money in payment of the costs of the suit for specific performance, and subject thereto towards payment of the monies so due and owing to him as aforesaid, and might have a proper conveyance, &c.; and that the residue of the monies owing to the appellant might be raised out of the rents and profits of the premises, and by mortgage, &c., and by the application for that purpose of the purchase monies for the lots one and six, when, and as the same should be paid. Thirdly, that if the Court should be of opinion that the judgment and encumbrances of Remnant or any of them, ought not to be postponed as aforesaid, then that an account might be taken of the monies owing to Remnant, which were secured on the premises, and entitled to such priority; and that the costs

claimed by Remnant against Neale might be taxed. Fourthly, that an account might be taken of the rents and profits of the hereditaments received by Remnant since he had been in possession thereof, or which, but for his wilful default or neglect he might have received; and that Remnant might be disallowed all such sums as should have been improperly applied by him. Fifthly, that when the claims of Remnant should have been ascertained, Shaw might have the like relief as was thereinbefore prayed, subject to such claims.

Answers were put in to the bill, which, as to Mr. Turner, who disclaimed any interest, was dismissed.

The cause came on to be heard before the Master of the Rolls, on the 29th January, 1855, and by a decree dated 23d March, 1855, it was ordered that so much of Shaw's bill as sought to have it declared that he was entitled to a priority and preference to the judgments and encumbrances of Remnant, or to impeach or postpone such judgments and encumbrances, or any of them, or to open any account *settled as between Remnant and * 588 Neale, deceased, or to tax any bill or bills of costs of Remnant, included in such settled account, should stand dismissed out of Court: and that an account should be taken of what was due to Remnant, for principal and interest on the mortgage securities executed in his favour by Neale, prior to the 30th November, 1852, and that an account should be taken of the rents received by him, and of his application thereof, in the usual way as against a mortgagee in possession, and the usual decree was made for redemption by Shaw on payment thereof, and of the costs of Remnant, of that suit: and it was ordered that Shaw should be at liberty to add what he should have paid to Remnant, together with his own costs, to his debt. (20 Beavan, 157.)

The present appeal was then brought.

Mr. Rolt and *Mr. Selwyn* for the appellant. — An attorney has a lien on the estate recovered for the amount of his costs expended in its recovery: *Turwin v. Gibson*,¹ *Barnesley v. Powell*.² In the first of these cases Lord Hardwicke said: "A solicitor, in consideration of his trouble, and the money in disburse for his client, has a right to be paid out of the duty decreed for the plaintiff, and a lien upon it before the bond creditors": and in the other case a

¹ 3 Atk. 720.

² Ambl. 102.

solicitor of a lunatic applied to the Court to declare that he stood in the place of the committee, and had a lien on the lunatic's estates, and the application was granted. It is true that the reporter adds a note, "Qy. If he had such lien. The counsel for the solicitor doubted of it. N. B. — Nobody appeared for Powell, and the petitioner had in his hands the title deeds of the estate, which seems to be the best security"; but the doubt thus *589 expressed is *not well founded. There is no question but that the solicitor would be entitled to a lien on a fund in Court, or on the papers in his hands: *Worrall v. Johnson*,¹ *Lambert v. Buckmaster*,² and there is no principle on which to distinguish between a fund obtained by the prosecution of a suit and an estate obtained in the same manner.

[LORD WENSLEYDALE. — I never heard such a proposition at law. LORD ST. LEONARDS. — Nor I in equity.]

Yet the principle is clear that the solicitor is entitled to payment. Out of what fund is he to be paid, except out of that which he has been the means of recovering.

[LORD BROUGHAM. — Suppose the estate changed hands by purchase, would the lien attach on it in the hands of a purchaser?]

It would not, if he purchased without notice; otherwise it would. It might perhaps be difficult in many cases to prove notice, but here the deeds were in Court, and have never been parted with; and no one could purchase without notice. The rule was laid down in *Turwin v. Gibson* and *Barnesley v. Powell*, and no case applicable to real estate has since occurred to bring it in question.

Then, as to the question of what Remnant can claim under his securities. Assuming the appellant to have priority here by force of the registration in January, 1841, then what are called by Remnant the "future advances," and made, as he alleges, under a deed previously executed, cannot be brought into account against the appellant, for they consist almost entirely of costs, and were, besides, made after notice of Shaw's encumbrance: *Wilmut v. Pike*.³ The case of *Gordon v. Graham*,⁴ which will be relied on by the respondent, is not an authority.

*590 * The claim of priority here depends on the construction

¹ 2 Jac. & W. 214.

⁵ 5 Hare, 14.

² 2 B. & C. 616.

⁴ 7 Vin. Abr. 52, pl. 3, 2 Eq. Cas. Abr. 598, pl. 16.

of the 18th section of the 1 & 2 Vict. c. 110, as affected by the 4th section of the 2 & 3 Vict. c. 11. There was here "a rule of a court of common law," by which costs were payable, and this rule being registered under the 18th section of the former of these Acts became a charge upon the land.

[LORD WENSLEYDALE. — They could not be "payable" till they were ordered to be paid. Even an *allocatur* is no more than an award; it finds what is due, but it is not an order to pay.]

Then as to the question of the re-registration. Assuming that the order to pay the costs found due by the Master's *allocatur*, made absolute in January, 1841, was the first order that could by registration obtain the force of a judgment, then it is clear that from the date of its registration on 30th January, 1841, it took priority over any of Remnant's subsequent securities. The object of the statutes was to secure that a person becoming a subsequent encumbrancer should have statutory notice of a prior encumbrance. He has that notice from the moment that such encumbrance is first placed on the register, and no omission to renew it within five years can have the effect of annulling it. The omission to re-register within five years can only be taken advantage of by a person who becomes an encumbrancer after the expiration of the five years, and before the re-registration takes place. Such was the construction placed in Ireland on a similar statute, 9 Geo. 4, c. 35: *Hickson v. Collis*.¹ In like manner in *Beavan v. Lord Oxford*,² A. B. and C. were judgment creditors of D.; A. and B. having priority over C. A. and B. subsequently omitted to re-register their judgments within five years, but C. duly re-registered within the five years. It was held by the full *Court *591 of Appeal that A. and B. did not thereby lose their priority.

The previous decision in the present case was then observed upon, and in substance overruled. The construction of the statute adopted in *Beavan v. Lord Oxford*, and now contended for by the appellant, is that which is recognised in *Vendors and Purchasers*;³ and Lord Justice Knight Bruce, in *Freer v. Hesse*,⁴ intimates, though he does not directly express, that that is the construction which he should put on the statute.

Remnant cannot here be allowed to object that the security to Shaw dates only from the rule absolute for the payment of the

¹ 1 Jones & L. 94.

² 13 ed. p. 425.

³ 6 De G., M. & G. 492.

⁴ 4 De G., M. & G. 495, 502.

costs, for it was by Remnant's own culpable act that Neale was kept out of the way to avoid service of the rule to tax; and Shaw was in that manner prevented for a very long time from obtaining the rule absolute for payment of the costs.

[LORD WENSLEYDALE. — Is there any rule which obliges an attorney to tell where his client is, in order to enable another person to serve process upon him?]

If there is no such rule at law the attorney who keeps him out of the way to avoid service of process cannot be allowed in equity thereby to obtain for himself any personal advantage.

Shaw has by force of the words used in the order to tax, and of the directions thereon given by the Master, a right to have the assignment to him of the terms of one thousand years treated as a security for payment of what is due. The terms used in those documents amount to an agreement that they shall be so treated.

Mr. R. Palmer and Mr. E. K. Karslake for the respondent. — There is in reality but one point to be considered, and that is the construction of the statute as to re-registration.

* 592 * [THE LORD CHANCELLOR. — Their Lordships are all clearly of opinion that there is no lien of the attorney or solicitor on the estate recovered.]

There can be no point on the term to attend the inheritance, for the deed creating that term was executed in January, 1837, when Neale was not possessed of the estate, and had not obtained the title deeds, for they were not brought into Court, under the compromise till after August in that year.

There is no pretence for saying that there was any charge within the meaning of the statute till the order to pay was made: *Neale v. Postlethwaite*,¹ *Gibbs v. Flight*.² The order to tax was a mere direction to ascertain an amount; the *allocatur* itself was a mere finding of the amount, and there was nothing to bring the matter within the words of the statute till the rule to pay the amount due was made absolute in January, 1841. That is the earliest period from which the appellant can claim to have any charge on the estate. The charge which he then obtained by registering that rule was lost by the omission to re-register within five years afterwards.

The 1 & 2 Vict. c. 110, section 18, which provides for the regis-

¹ 1 Q. B. 248.

² 22 Law J., N. S., C. P. 256, 17 Jur. 1034.

tration of decrees, orders, and rules, and makes them become charges upon land, enacts that such decrees whereby any sum of money or any costs shall be payable to any person, shall have the effect of a judgment in the Superior Courts, and the persons to whom such monies or costs shall be payable shall be deemed judgment creditors ; provided (§ 19), that that shall not be the case, "unless and until a memorandum," described by the statute, shall be left with the Senior Master of the Common Pleas. Then comes the 4th section of the 2 & 3 Vict. c. 11, which enacts that all judgments, decrees, orders, and rules, which since * the * 593 passing of the first Act have been registered, or shall hereafter be registered, shall after the expiration of five years from the date of the entry thereof, be null and void against lands, &c. as to purchasers, mortgagees, or creditors, "unless a like memorandum is again left with the Master of the Common Pleas, within five years before the execution of the conveyance, mortgage, &c., vesting or transferring the legal or equitable right to the estate or interest in or to any such purchaser or mortgagee for valuable consideration, or as to creditors, within five years before the right of such creditors accrued, and so *toties quoties* at the expiration of every succeeding five years." These enactments make the unbroken continuance on the registry a condition on the performance of which the judgment or rule can alone affect the lands. But for that being so, the decree or judgment might appear to be satisfied, and frauds might be committed which it was the object of these statutes to prevent. Registration was intended as the substitute for notice, the doctrine of which had been found in many instances to create instead of preventing litigation ; and the law as to notice is expressly repealed by the 3 & 4 Vict. c. 82, § 2. In *Freer v. Hesse*,¹ Vice-Chancellor Stuart expressed an opinion that if a registration was not renewed within five years from the date when it was first made its effect was annulled. That case was taken, on appeal, before the Lords Justices,² and they may be considered as having adopted, though the form the case then assumed prevented the necessity of their expressing, the same opinion. But it was undoubtedly adopted by the Master of the Rolls in the present case,³ and seems to have been entertained by Lord Justice Knight Bruce in * *Beavan v. Lord Oxford*,⁴ for he * 594

¹ 17 Jur. 177.² 20 Beav. 157.³ 4 De G., M. & G. 495.⁴ 6 De G., M. & G. 492.

said,¹ "I doubt whether, according to the true interpretation of the statute, Mr. Taylor is not entitled to the preference he seeks." And Lord Justice Turner observed,² "The question is, whether a judgment prior on the registry, but not duly re-registered, is by the section made void against a subsequent judgment which has been duly re-registered, for there is nothing to take away the priority of the antecedent judgment, unless this section has made it void against the subsequent one. My opinion has fluctuated upon this point, but the conclusion at which I have arrived is, that the enactment has no such operation. The section may well be divided into two parts, the first part enacting that a registered judgment shall be void after the expiration of five years, unless re-registered, the second part providing the means by which they may be kept on foot after that period has expired. It is clear that the words 'purchasers,' 'mortgagees,' and 'creditors,' as used in the second part of the section were meant to apply, and can apply only to purchasers, mortgagees, and creditors becoming so subsequently to the date of the registered judgment; and I think it would not be a sound construction of the statute to give a more extended construction to the same words as used in the first part of the section." The doubt thus entertained is fully justified, and the decision of the Master of the Rolls in this case is more in accordance with the words and object of the statute than that which was ultimately arrived at in *Beavan v. Lord Oxford*. What are the words of the statutes? By the first Act there can be no charge "unless and until" a memorandum of the judgment is registered. By the second Act the formula as to the time is varied at the commencement and at the conclusion of the

* 595 clause. At the end of * five years the registry previously made becomes void, unless the like memorandum is again left five years before the execution of the conveyance to a purchaser. The first reckoning of time is from the date of the original entry, and it ends with the words "purchaser, mortgagee, or creditors." Time is there reckoned forwards. The second branch begins with the words "unless a like memorandum," and there time is reckoned backwards from a subsequent conveyance. The "like memorandum" must be left five years before the date of this subsequent conveyance.

[THE LORD CHANCELLOR (LORD CHELMSFORD). — Is not the word

¹ 6 De G., M. & G. 504.

² 6 De G., M. & G. 505.

“before” a difficulty in the way of your construction? Suppose a registered judgment. During the five years of the registry a mortgage is executed. At the proper time, at the expiration of the five years, the judgment creditor re-registers. Though he does so within the five years, it is not within five years before the execution of the mortgage. Does not your construction require an impossibility?]

When the re-registration is within the five years it is a continuation of the original memorandum, but where that period is allowed to pass by, it becomes an original registration, and all deeds preceding that date have priority over it.

The 18 & 19 Vict. c. 15, contains (section 6) a provision as to re-registration, which is worded in the same manner as the 4th section of the 2 & 3 Vict. c. 11.

[LORD ST. LEONARDS. — That section was introduced to remedy the doctrine supposed to have fallen from the Court in *Freer v. Heese*.¹]

In all the statutes the word “purchaser” means a person who takes for valuable consideration, and it was the intention of the Legislature that he should be protected against every thing except a perfect and complete registration of * a judgment, * 596 and that he should not be affected by formal or constructive notice. That is the opinion of the Court in *Beere v. Head*,² where the intention of the Legislature in passing these Acts was elaborately discussed.

In *Knox v. Kelly*³ Lord Plunkett pronounced his opinion on the statute passed for Ireland, 9 Geo. 4, c. 35, containing provisions similar to those of the 2 & 3 Vict., and declaring judgments after the expiration of twenty years to be void unless they are duly revived and redocketed within twenty years before the conveyance to the purchaser. It is true that in *Hickson v. Collis*⁴ Lord Chancellor Sugden differed in some degree from Lord Plunkett, and took a view of the statute favourable to the other side, but the circumstances of that case account for that difference, and prevent it from having any direct bearing on the present. *Beavan v. Lord Oxford*⁵ is likewise inapplicable, for there the question was not as to a purchaser at all, but as to a possible failure of security as to one of three persons, all whose interests were subsisting at the same time.

¹ 17 Jur. 177.

² 3 Jones & L. 340.

³ 1 Drury & Wal. 542.

⁴ 1 Jones & L. 94.

⁵ 6 De G., M. & G. 492.

The respondent here is entitled to have his subsequent advances taken into account. He has so by the effect of the deed of June, 1839, and by the rules of equity. In *Gordon v. Graham*,¹ the second mortgagee had notice of the first mortgage, which was given as a security for money already lent, and hereafter to be lent; and the first mortgagee having lent more money and obtained a fresh mortgage, Lord Chancellor Cowper held that the second mortgagee could not redeem the first, without paying off the money lent after as well as that lent before the second mortgage. The rule in that case ought to be applied here.

* 597 * [LORD ST. LEONARDS. — If Lord Cowper had in the end maintained the opinion he was at first supposed to express, he could not have made the order of reference to the Master which is found in that case.]²

Mr. Rolt, in reply, relied on the terms of the order to tax, and of the *allocatur*, as proof that the Court and the Master had treated the terms of one thousand years as securities placed in the hands of Shaw, to provide for payment of his claims.

[LORD WENSLEYDALE. — The Master had no power to make the terms a security for any thing more than before.]

Then as to the construction of the 2 & 3 Vict. c. 11, *Freer v. Hesse*³ is the only case at all justifying the construction now sought to be put upon that statute, and that case is no authority.

THE LORD CHANCELLOR, after fully stating the facts of the case, said: Against this decree the present appeal is made. Various points were urged to your Lordships on the part of the appellant, many of which were disposed of in the course of the argument, and in the result there appear to be three main and principal questions which remain to be decided. The first is, what is the effect of a rule for the taxation of Mr. George Shaw's costs which was made in the month of June, 1838, and followed by the Master's *allocatur* in April, 1839, upon the question of priority. Secondly, from what time the security of Mr. Shaw the appellant is to be

¹ 2 Eq. Cas. Abr. 598, pl. 16, 7 Vin. Abr. 52, pl. 3.

² "But upon the importunity of counsel, it was ordered that the Master should report what money was lent by the first mortgagee after he had notice of the second mortgage." 2 Eq. Cas. Abr. 598, pl. 16.

³ 17 Jur. 117.

dated. And thirdly, supposing the date of Shaw's security to be the 30th of January, 1841, whether, on redemption, Remnant * is entitled to be paid off advances which were made * 598 by him to Neale, subsequently to the date of Shaw's security, but made in respect of a mortgage which was prior in point of date.

It is impossible to avoid expressing the very deepest regret that this title of Neale, which was established by recovery in ejectment, should have been wholly barren of benefit to him and to his family ; that with the exception of a small weekly or annual payment made to him by Mr. Remnant during the last few years of his life, no advantage whatever was derived by him or by his family from this property. The whole has been absorbed and swallowed up in a course of litigation which has taken place, which was wholly unwarranted and unjustifiable, quite incommensurate with the value of the property, and which has produced this result, that the case now is a mere contest and struggle between the two solicitors which shall lose a portion of his large demand for costs, the estate itself being insufficient to satisfy them both. It is unnecessary for your Lordships, and it would perhaps be difficult to apportion the blame between these parties. Neither of them is entitled to the slightest favourable consideration, and your Lordships will deal strictly with their rights, whatever those rights may be.

After the recovery of the estate, Mr. Shaw, the appellant, obtained an assignment of two outstanding terms of one thousand years each to attend the inheritance as a trustee for James Neale. And it was insisted by the counsel for the appellant, that he was entitled to make use of those terms for the purpose of establishing his priority over Mr. Remnant. Your Lordships intimated a very clear opinion in the course of the argument, that the appellant, a mere trustee of terms to attend the inheritance, had no right to avail himself of the terms for that purpose. And that point was * abandoned on the part of the appellant's coun- * 599 sel ; and he relied upon a subsequent transaction in respect of those terms arising out of the words of the order and the Master's *allocatur*, which will presently be considered.

The rule for taxation and the *allocatur* were registered by the appellant on the 16th of April, 1839. It was contended that the security of Mr. Shaw must be dated from the registration of that rule and the *allocatur*, inasmuch as it was alleged that that was a

rule for the payment of costs within the terms of the 18th section of the Statute 1 & 2 Vict. c. 110. It is perfectly clear, however, that that rule for taxation and *allocatur*, did not amount to a rule or order within the meaning of that Act of Parliament. The rule for taxation is nothing more than an order of the Court that the Master shall proceed to ascertain the amount of costs due to the solicitor, and the *allocatur* certainly cannot be considered a rule for the payment of money, because it is merely the declaration of the Master's judgment with regard to the amount of costs to be paid. It is quite clear, therefore, that there was no order whatever for the payment of money within the terms of the Act of Parliament until the rule absolute for the payment of costs was obtained, which was on the 28th of January, 1841. That rule was registered on the 30th of January, 1841, and it will be upon that rule that the question of the priority of Mr. Shaw's security will mainly depend.

Now turning to the securities which were obtained by Mr. Remnant, it appears that they commenced by a warrant of attorney to confess judgment for 500*l.*, which was obtained by him in the month of March, 1839; judgment was entered up upon that warrant of attorney, and upon that judgment an *elegit* issued and possession was delivered by the sheriff, whether to * 600 Neale or to Remnant * does not very distinctly appear; but there is no doubt that Remnant very soon afterwards obtained possession of the estates; and he has ever since been in the receipt of the rents and profits. There was another security obtained by him on the 12th of June, 1839. That was a mortgage to secure a sum of 647*l.*, and interest, that 647*l.* including the 500*l.* upon the warrant of attorney, and a sum of 147*l.* for advances which were subsequently made. But that mortgage was also to secure future advances which might be made by Remnant to Neale to the extent of 1000*l.*

It is unnecessary to go in detail through the various particulars of those securities which were afterwards obtained, though it may be necessary to advert to one which I think was given on the 16th of April, 1840, and which, on the part of Shaw, it was contended Remnant had no right to charge against him, inasmuch as it was alleged that that was obtained during a period of time in which Remnant was keeping Neale out of the way, for the purpose of preventing his being served with the Master's *allocatur*. Shaw in-

sisted that this security, having been taken at a time when Remnant was employed in defeating the remedy which he, Shaw, had obtained by means of that *allocatur*, it was fraudulent as against him, and Remnant had no right to charge it against him. There can be no doubt at all that during the whole of this period Remnant was perfectly aware where Neale was to be found; but there was no obligation upon the solicitor to produce his client, for the purpose of being served with a proceeding which would render him liable to the payment of a sum of money. And even if there could be any such obligation upon him, still the omission to perform a duty of that description would not invalidate the securities which he obtained in the intermediate period.

The last of the securities, which included every thing that * was due to Remnant at the time, was of the date of the * 601 8th of January, 1844, being a mortgage for the sum of 1796*l*. Now it will be observed, that besides this mortgage, there were securities to Remnant, which were prior in point of date to the security given to Shaw, supposing that it is to be dated from the 30th of January, 1841, and not from an earlier period. But an endeavour was made to carry up the claim of Shaw even beyond the period of the Master's *allocatur* on the 11th of April, 1839; because it was insisted that in consequence of the estate having been recovered by the exertions of Shaw, he was entitled to charge the costs and expenses which had been incurred in the recovery of the property, and to make those a lien upon the estate. And for the purpose of supporting this position the case of *Barnesley v. Powell*¹ was cited. Certainly that case seems to me to want very much the force of an authority for such a proposition. It appears to have been heard *ex parte*. There is no report whatever of any argument having taken place; and it is said that the counsel for the solicitor whose lien was declared upon that occasion, "doubted of it," (that is the expression in the report); he doubted whether there could be any such lien. I think that doubt is very well founded, because to hold that a solicitor obtaining a real estate for his client could be entitled to a lien upon it for his costs and charges, would be entirely contrary to the principle upon which the doctrine of lien proceeds. There can be no lien upon any property unless it is in the possession of the party who claims the lien. But if an estate is recovered by a solicitor, or if through

¹ Ambl. 102.

a solicitor it is conveyed to the client, the solicitor is not in possession of the estate, but his client is in possession of it. All * 602 that the solicitor has are the deeds * and documents. He has a lien upon them. He may render them available for the purpose of establishing his claim. But it is quite clear that he cannot say that he has any such lien upon the estate as, within the principle of the doctrine which I have suggested, can entitle him to maintain it as a charge upon the property. However, an intimation of your Lordships' opinion to that effect having been given in the course of the argument, it was apparently abandoned by the counsel on the part of the appellant, and he fell back upon the terms of the *allocatur* of the 11th of April, 1839, which he contended gave him, by the terms of it, a charge upon the estate.

Now it will be necessary to call your Lordships' attention to the terms of that *allocatur*, because it appears to me to have no such force as that which was contended for on the part of the counsel for the appellant. There was a rule for the taxation of costs; and in that rule it was provided that the Master should have power to decide whether "George Shaw shall execute the assignments of terms mentioned in the bills numbered 10 & 11, to the plaintiff's appointee, and also shall have power to decide at whose expense the assignments shall be prepared and executed." Then it appears that the Master, after, by his *allocatur*, finding the amount of costs, goes on, "and I direct that upon payment of the sum allowed, or upon security to be given to my satisfaction, the said George Shaw shall execute assignments of the terms mentioned in the bills numbered 10 & 11, to the plaintiff's appointee, at the expense of the said plaintiff."

It was contended by the appellant's counsel, that this gave the appellant virtually a charge upon this estate, and that giving him a charge at that period, it necessarily gave him priority over the securities of the respondent Remnant. But I think there * 603 can be no doubt that no such * effect can be given to the Master's *allocatur*. In the first place, he had no power whatever to direct that those terms which had been assigned to attend the inheritance should stand as a security for the amount of the costs found to be due to Shaw. And, even if he had that power, the terms of his order or *allocatur* amount to much less than giving any such charge. They certainly enable Shaw to say, "I will not assign these terms unless the amount of my bill of

costs is paid"; but he is placed in no better situation with regard to the alleged charge upon the property by reason of this operation upon the part of the Master. He may take whatever benefit he can from the terms of this *allocatur*, but unquestionably he is not entitled to use the *allocatur* for the purpose of establishing this priority of charge which he claims.

Then it seems to be perfectly clear that it is impossible for the appellant Shaw to date back the commencement of his security prior to the 30th of January, 1841, when he registered the rule absolute for the payment of costs, which was made on the 28th of January, 1841. But then arises the question, whether he is entitled to date his securities from that period, the 28th of January, 1841, or only from a subsequent period; because it seems that that judgment (as it may be called), having been registered first of all on the 30th of January, 1841, was not re-registered within five years, but was re-registered after the five years had expired, and again was re-registered after the expiration of another five years from the re-registration. It was registered again on the 30th of November, 1852. The Master of the Rolls has decided that Shaw was not entitled to any priority in respect of his encumbrance before that date, the date of the last registration, namely, the 30th November, 1852; and that question depends upon the construction which is to be given to the Statute 2 & 3 Vict. c. 11, § 4.

* It will be necessary, as there has been a good deal of * 604 discussion upon this subject, to attend particularly to the terms of that provision. [His Lordship read it.] His Honor, the Master of the Rolls, upon a view of this section, and the 4th section of the 3 & 4 Vict. c. 82, to which it is unnecessary to advert, stated (20 Beav. 183): "I think it clear, on the construction of these clauses, that the previous registrations of this order are to be treated as nothing. It is true that it was under the first statute a valid and subsisting charge when the defendant Remnant advanced his money or obtained his security; but it ceased to be any charge at all when the five years had elapsed, and it became, so far as regards his interest, exactly as if it had been paid off, and the registration again operates only as if a new judgment had been created and a new charge had been put on the land."

So that it is apparent that his Honor considered that supposing there had been a registered encumbrance, and within the five years during which the registration continued the estate had been

dealt with in the way of mortgage, or it had been sold for a valuable consideration, or there had been a debt incurred which gave a right to a creditor within the same period, and if the original encumbrancer omitted to re-register within the five years, by the operation of the Act of Parliament his security was postponed to those which were subsequent to him, — that it was rendered null and void as against those subsequent purchasers, mortgagees and creditors.

I confess that I cannot bring myself to take that view of the Act of Parliament, or of the meaning of the Legislature. I am not prepared to say that the section in question is expressed in the most clear and unambiguous language; but I think that, taking the whole of it together, and not breaking it into separate
 • 605 parts, as was done at the bar, * the intention of the Legislature is clear and apparent, and that a sensible interpretation may be put upon the provision. I have no doubt whatever that what the Legislature intended was this, to give to a registered encumbrancer the benefit of that registration during the five years in which it endured, and to render it a protection to him against any purchasers, mortgagees, or creditors, who might become so during the currency of the period of registration. And so with respect to re-registration, and *toties quoties* at the end of every five years when registration is required; so that according to my view of the construction of this provision, if, after the expiration of the first five years, the encumbrancer omitted to re-register, and in the intervening period before his re-registration a person became a mortgagee or purchaser of the estate, that subsequent re-registration would not prevail against such mortgage or purchase, but that mortgage or purchase would have priority over the encumbrance which the party had failed to re-register within the term, and so advantage would be given to other parties to intervene and to obtain the benefit as of prior security.

Objections were very ingeniously pressed upon your Lordships by the learned counsel for the respondents, which would arise from adopting the construction I have been suggesting, and which it may be extremely difficult satisfactorily to answer. But at the same time, your Lordships are not called upon to do so. It will be sufficient when they arise, to say how the intricacies of those cases are to be unravelled, and how the complicated interests which are suggested are to be decided upon. Your Lordships are to deal

with these provisions of the Act of Parliament according to the sound and reasonable construction arising out of the meaning of the language used by the Legislature. And if your Lordships are pressed with difficulties in the way * of the con- * 606 struction which I have been now suggesting, I must observe that there are equal difficulties on the opposite side to be struggled against, which it is necessary to advert to in support of this construction. I am, for instance, at a loss to understand how it is possible, in certain cases that might be put, for the party to comply with the provisions of this Act of Parliament so as to obtain the benefit of his security in the terms of this section, for the party is to re-register "within five years before the execution of the conveyance, settlement, mortgage, lease, or other deed or instrument, vesting or transferring the legal or equitable right, title, estate, or interest." Now, how is it possible for a registered encumbrancer to comply with this provision in the case of a person becoming a mortgagee or purchaser during the currency of the five years' registration? How, in such a case, is a person registered as encumbrancer to re-register before the execution of the conveyance or mortgage which vests or transfers the legal or equitable right? And, as the Legislature has declared that if a person fails to re-register in this way, his security shall be null and void against the mortgagee, purchaser, or creditor, the consequence of that would be, that the mortgagee would be entirely deprived of the priority of his security, and that it would be wholly null and void against any other persons who had become mortgagees or purchasers during the currency of that period of registration.

There is not wanting very high authority in favour of the construction which I am suggesting to your Lordships, because the case of *Beavan v. The Earl of Oxford*,¹ seems to me to be a clear authority, overruling the decision of the Master of the Rolls in this case of *Shaw v. Neale*. That case was cited in the course of the argument * upon the present. There Lord * 607 Cranworth adverted to this very difficulty of complying with the provisions of the Act of Parliament which I last mentioned. His Lordship says:² "It does not appear to be pointed out in argument that the provisions of the statute never can be complied with as to mortgages completed before the re-registry; it is impossible to re-register within five years previously to the date of the

¹ 6 De G., M. & G. 492.

² 6 De G., M. & G. 503.

deed creating a mortgage prior to the re-registration." His Lordship upon that occasion decided the case upon his view of the proper construction of the provisions of this statute. It was supposed that his Lordship had come to that decision, being influenced by a judgment of Lord St. Leonards in the case of *Hickson v. Collis*,¹ that case being upon an Irish Act of Parliament, which is in many respects strikingly analogous to the provisions of this statute. Certainly Lord Cranworth in that case did consider that the case of *Hickson v. Collis* was a case which might be urged as an analogy, not merely for the purpose of illustration, but also for the purpose of argument in support of the decision at which his Lordship arrived. With respect to the opinion of Lord Justice Turner, it is said that his mind fluctuated a good deal during the course of the argument; but it will be found that in the result he came to a clear determination with regard to the proper construction of this Act of Parliament, of which he took the same view as that which Lord Cranworth had previously taken. Without adverting to those authorities, or pressing them any further upon the attention of your Lordships, I think the observations which I have made upon the construction of the language of the Act of Parliament will be sufficient to induce your Lordships to adopt the construction which I have proposed, whatever

*608 *difficulties may be ingeniously suggested, it being quite apparent that equal difficulties may be suggested on the other side against the construction which is contended for by the respondents.

This therefore being the view I have taken, the result is, that the security of Mr. Shaw must have priority from the 30th of January, 1841, being the date of the first registration of that security. And then the only remaining question which your Lordships have to consider is one which was pressed on the part of the respondents, namely, whether Shaw, in redeeming the securities of Remnant, ought to be called upon to pay off the advances which were made by Remnant subsequently to the date of the security of the 30th of January, 1841, but made in respect of a mortgage which was dated prior to the registration of that security.

Now upon that subject it appears that the mortgage in question is of the date of the 12th of June, 1839. It is a mortgage to

¹ 1 Jones & L. 94.

secure the sum of 647*l.* with interest, and also to secure future advances which might be made by Remnant, to the extent of 1000*l.* It was insisted on the part of the respondents, upon the authority of the case of *Gordon v. Graham*,¹ that Remnant, when his mortgage was redeemed, was entitled to have those subsequent advances paid off. But the authority of that case (it is a single authority upon the subject) has always been considered extremely questionable. I do not, however, think that your Lordships upon this occasion will be under the necessity of expressing any opinion with regard to the propriety of that decision, because even supposing that Remnant is entitled to claim to receive the advances which he made to Neale subsequently to the date of the security * of the appellant Shaw, yet in point of fact it * 609 appears that those were not advances that were made by him of sums of money to Neale, but that the most numerous parts of the claim arising in respect of those alleged subsequent advances were portions of his enormous bill of costs, which swelled up to the amount of between 1600*l.* and 1700*l.*; the bills of costs of the two attorneys (one cannot help making the observation in passing) upon an estate, the utmost value of which does not reach 4000*l.*, being upwards of that sum of 4000*l.* Therefore, even supposing that Remnant might be entitled to claim in respect of advances which had been *bond fide* made subsequently (upon which your Lordships will probably express no opinion), yet it is impossible to say, under the circumstances, that Remnant can be entitled to charge those advances upon his redemption by Shaw, or that they can be brought in any way into the account against Shaw's security of the 30th of January, 1841.

I believe, my Lords, that these observations will have exhausted all the questions which are to be decided in this case. And the result to which I have come is this, that as his Honour the Master of the Rolls decided that the securities of Remnant which were obtained prior to the 30th of November, 1852, were to be taken into account against Shaw upon his redemption, and as your Lordships will probably agree with me in opinion that the security of Shaw is to have date from the 30th of January, 1841, it is quite clear that the decree of the Master of the Rolls cannot stand to the extent to which it goes, but must be varied. In point of form the decree will be reversed, but with a declaration as to what

¹ 7 Vin. Abr. 52, pl. 3, 2 Eq. Cas. Abr. 598, pl. 16.

should have been the decree pronounced by his Honour the Master of the Rolls, which, in fact, will be a decree in the ordinary
 * 610 terms of a decree * of foreclosure and redemption. It is unnecessary, perhaps, for me to go further than to state it in these general terms, because the parties are both prior and subsequent encumbrancers; and, therefore, there will be redemption and re-redemption if the parties so please. There will be a little complication with regard to these transactions; but, upon the whole, that appears to me to be the judgment at which your Lordships ought to arrive in this case.

LORD BROUGHAM. — My Lords, I entirely agree with my noble and learned friend. He has gone so fully and so clearly into the whole of this matter, that it is quite unnecessary for me to trouble your Lordships with more than a single observation, which is, that we all, during the course of the argument, came to the same conclusion. My noble and learned friend Lord St. Leonards, who is not now present, entirely agrees with us upon this matter, and if he had been here, I am quite confident that he would have taken the same course which I am now taking, namely, to express his entire concurrence, not merely in the conclusion at which my noble and learned friend has arrived, but in the grounds upon which that conclusion is rested.

My Lords, there is a case to which I have been referred by the learned Reporter, my learned friend Mr Clark, which was decided by your Lordships here, three years ago, the case of *Lane v. Horlock*,¹ which does throw some light upon one part of this case, as to the effect of a Master's *allocatur*, as a charge upon land. The question arose there, as my noble and learned friend opposite will recollect, as to the effect of a warrant of attorney, to
 * 611 confess judgment, — whether a * warrant of attorney to confess judgment brought the case within the proviso of the Usury Act of the 2 & 3 Vict. c. 37, and therefore continued the Usury Law against those bills of exchange to secure the payment of which the warrant to confess judgment had been given. And, although we did not expressly decide that the warrant was no real charge, yet no man can read the report of what fell from my noble and learned friend and myself² upon that occasion without seeing that we clearly held, that though a judgment would no doubt

¹ 5 H. L. Cas. 580.

² 5 H. L. Cas. 594, 595, 603.

have been a charge upon the land, yet that a mere warrant to confess judgment did not constitute such a charge.

LORD CRANWORTH. — My Lords, I am very much inclined to take the same course as my noble and learned friend opposite, and to say next to nothing upon this subject, because it has been exhausted by the Lord Chancellor. And I should not have said a word, were it not that, in truth, the main question is one of such general importance that it is of consequence that it should be generally known to the profession, and to the public, that it is the distinct opinion of noble and learned Lords in this House that the correct view of the construction of this statute is the view that was taken by the Court of Chancery in the case of *Beavan v. The Earl of Oxford*,¹ and not the other view which has been adopted by more than one of the Judges of the Court of Chancery, including the Master of the Rolls in the present case.

The question here is merely a question of priority of certain encumbrances. I take the facts to be now clearly established. In the first place, Remnant is the first encumbrancer in respect of judgment and securities prior to the * 80th of Jan- * 612
uary, 1841. Upon that day, by virtue of a rule of the Court of Queen's Bench, then for the first time registered, Shaw, the present appellant, became a valid encumbrancer by judgment upon the property in question to the extent of 1238*l*. Subsequently to that, Remnant became an encumbrancer again. And the question to be decided is, what were the legal priorities of those different charges? On the part of Shaw it was argued that he was an encumbrancer, not merely from the 30th of January, 1841, when the rule absolute of the Court of Queen's Bench was registered, but that he was an encumbrancer from the date at which the rule of the Court was made ordering his bill to be taxed. My noble and learned friend on the Woolsack has disposed of that question. It appears to me preposterous to argue that an order upon an officer of the Court to ascertain what is due can by any possibility amount to an order to pay. And so again as to the report of that officer, the *allocatur*, stating what is due, it is preposterous to contend that that is an order to pay. They are both proceedings in order to arrive at that which is the ultimate judgment, namely the direction of the Court that payment shall be made.

¹ 6 De G., M. & G. 492.

which in point of form must be introduced, but which I am afraid is a mere matter of form, that Neale may redeem the whole upon the payment of all that is due. And with this declaration I think the decree of the Master of the Rolls ought to be reversed.

LORD WENSLEYDALE. — My Lords, I am entirely of the same opinion with my noble and learned friends, that the decree of the Master of the Rolls ought to be reversed. I concur entirely in what has fallen from my noble and learned friend opposite, upon the important question in this case, whether or not the case of *Beavan v. The Earl of Oxford* was properly decided. I consider that that was rightly decided. That case has been so fully explained by my noble and learned friend, as to make it unnecessary for me to say any thing more upon it. With respect to the other questions in the case which have been so fully and elaborately considered by the Lord Chancellor, I entirely concur in every thing that he has said.

Decree appealed from reversed, and cause remitted, with a declaration.

Lords' Journals, 16th March, 1858.

1858. March 23.

ALFRED BAKER, *Appellant*.

ELIZABETH BAKER, *Respondent*.

Will. Annuity. Annual Income. Deficiency not made good out of Corpus. Replacing Fund sold.

A testator directed his brother A. B. (whom he appointed his executor and trustee) to get in his estate and to stand possessed of the produce thereof, on trust, to raise thereout and invest in the stocks or upon mortgage such a sum of money as that, when invested, the dividends should "realize the clear annual income or sum of 200*l.*," and to pay to "my wife such dividends, interest, or annual income," &c., for her life or widowhood. On her death or second marriage, A. B. was to stand possessed "of the said principal or trust money, and

the stocks upon which the same shall be invested," in trust for himself and the other brothers and sisters of the testator. And as to the residue, "after raising thereout the money sufficient to realize the annuity for my said wife," A. B. was to stand possessed thereof on similar trusts; provided that if the testator should die leaving children, the trusts for his brothers and sisters were to be null, and the children were to take the whole. The estate when got in and invested did not produce 200*l.* a year:—

Held (reversing the decision of the Court below), that the widow was not entitled to have the deficiency made good out of the corpus of the estate.

A certain portion of the fund itself had, under the order of the Court below, been sold to make good the deficiency: the House, on reversing the order, directed the widow to replace that portion.

THIS was an appeal against part of an order of the Lords Justices, affirming an order of the Master of the Rolls.

The testator, by his will, dated 17th September, 1851, gave all his real and personal estate to the appellant, his brother, to get in and sell the same, and as to the money arising therefrom, "it is my will, and I do hereby declare and direct that my said trustee do and shall stand possessed thereof, upon trust, to raise thereout and invest in the Parliamentary stocks or funds of Great Britain, or upon mortgage or other good security, such a sum of money as, when so placed out or invested, the dividends or interest thereof shall realize the clear annual income or sum of 200*l.*,

* and do and shall pay to, or permit and suffer, my said wife * 617 Elizabeth, to receive and take such dividends, interest, or annual income by two equal half-yearly payments, for and during the term of her natural life, provided she shall so long continue my widow, but not otherwise. And from and after her decease or second marriage, whichever shall first happen, it is my will, and I further declare that in case I shall die without issue, the said trustee shall stand possessed of the said principal or trust moneys, and the stocks, funds, and securities in or upon which the same shall be invested, upon trust for himself and my other brothers, Walter Baker and James Baker, and my sister Louisa, the wife of Thomas Grant, in equal shares and proportions."

Other provisions were then made, and the will proceeded thus: "And as to the residue of the said trust moneys arising from my real and personal estate and effects, after raising thereout the money sufficient to realize the annuity for my said wife, I hereby further declare that the said trustee shall stand possessed thereof, upon trust for himself and my said brothers and sister, in equal

shares and proportions. Provided always that, in case I should die leaving issue, then my will is, that the trust and bequests hereinbefore contained in favour of my brothers and sister shall be null and void, and that, instead thereof, my children shall take and be entitled to the whole of the said trust moneys and estate, in equal shares and proportions, at the same times and in like manner as hereinbefore directed and declared with regard to my brothers and sister."

The testator died on the 10th November, 1853, without issue, leaving his widow (the respondent), and his brothers and sister, him surviving.

The sum of 2735*l.* 7*s.* 4*d.*, 3*l.* per cent. Consolidated Bank Annuities constituted the whole residue of the testator's *618 * estates, and the dividends thereon did not amount to the sum of 200*l.* a year.

The Master of the Rolls declared the respondent entitled during her life or widowhood to the full amount of the annuity of 200*l.*, bequeathed to her by the will, and ordered the deficiency of the dividends to be made good to her from time to time out of the corpus of the fund, and directed a sufficient part of the corpus to be sold out from time to time accordingly.¹

This order was taken on appeal to the Lords Justices, who differed in opinion, and consequently it stood as affirmed. The present appeal was then brought.

Sir R. Bethell and *Mr. Hinde Palmer* for the appellant.—The cardinal point in construing this will is, that the widow is to take only through the medium of the investment; she can consequently take nothing but the interest thereby produced. The 200*l.* were never intended to be produced by the absorption of capital, for that would after a time put an end to the annuity altogether.

The money directed to be invested, constitutes a special trust fund, and is, upon the occurrence of either of one of two events, given over entire to the legatees in remainder. Where that was the case, Lord Lyndhurst, in *Foster v. Smith*,² overruling the decision of the Vice-Chancellor, held that the charge was only to be made good out of the rents, and not out of the corpus of the estate.

¹ 20 Beav. 548.

² 1 Phill. 629.

The rule of equity is, that if the principal is specifically bequeathed, effect must be given to the bequest, — *Howe v. Dartmouth*,¹ so that the property shall in the way pointed out go over to the legatees in remainder.

* The Master of the Rolls here thought that he was *619 bound by the authority of *Wright v. Callender*,² but the two cases are distinguishable, for that was the case of an accountant and a legatee, while this is the case of a tenant for life and a remainder man, a distinction which determines the rule applicable to the case. There nothing showed that the testator intended the fund to be continued in its integrity during the life of the annuitant, and in that state to go over. Here the words distinctly show such an intention; for upon the death or second marriage of the widow, the appellant is to “stand possessed of the principal sums or trust moneys” upon trust for the ultimate legatees. Strike out the word “annuity” in the latter part of the will, and say, as in the former part, “the clear annual income or sum,” and there cannot be a moment’s doubt about the matter. The general provisions of the will show that the testator did not intend to create an annuity absolutely charged upon this trust fund, but only to give an annual income if the fund should be sufficient to raise the same, preserving the fund itself for the remainder-men.

By one clause of his will the testator shows that he thought it possible he should have children; consequently, he could not have intended to annihilate the fund during their mother’s life, for that would have been to leave them without any provision. The whole fund is given to trustees, and their trust is to continue during the life of the widow, and until the conveyance of it to those in remainder. There have been cases, *Davies v. Wattier*,³ and *May v. Bennett*,⁴ where a deficiency of annual income has been made good out of the corpus which was to produce it, but that was where the deficiency was occasioned by the act of the Legislature, in converting the stock from one paying a *larger *620 to one paying a smaller interest; but they do not apply to the present. But even in some cases of that sort an opposite course has been taken, *Kendall v. Russell*,⁵ *Miller v. Huddleston*.⁶ The deficiency here was in the original fund itself, the amount of

¹ 7 Ves. 137.

² 2 De G., M. & G. 652.

³ 1 Sim. & S. 463.

⁴ 1 Russ. 370.

⁵ 3 Sim. 424.

⁶ 3 Macn. & G. 514.

which had been miscalculated by the testator; it was not occasioned by any subsequent events which he could not have foreseen. In *Hindle v. Taylor*,¹ which very much resembled the present, the Master of the Rolls himself held, that the "clear yearly sum" there given to the widow during life or widowhood, did not come out of the corpus, and that part of his decision was left unaffected on appeal.

Mr. Willcock and *Mr. Shebbeare* for the respondent. — The chief intention of the testator here was to provide for his wife. He had given her all his goods; he meant to give her all his money in preference to giving it to any one else. That being the clear intention apparent on the face of the will, any particular expression of a doubtful kind must be construed by it. No part of the residue was to be enjoyed by the legatees, except subject to the annual payment to the wife. The direction is to invest sufficient to "realize the clear annual income," a very strong expression to show the testator's intention, that all other objects were to be sacrificed to that. The gift here was that of an "annuity"; it is expressly so called in the latter part of the will. If so, every thing is subordinate to that, and it must be provided for at all events. In *May v. Bennett*² there were as strong expressions as there are here to indicate that the fund was to be preserved; yet, a deficiency arising, it was ordered to be made good out of * 621 * the corpus; and in *Davies v. Wattier*³ the same course was followed even to the extent of dealing with funds to which other persons had been judicially declared entitled. *Wright v. Callender*⁴ is an authority for the present decision, and the two cases cannot be distinguished from each other. There the testator directed his executors, as they are directed here, to stand possessed of his personal estate upon trust to invest a sufficient portion thereof in the funds to produce an annuity of 2l. per week, to be paid to one of his sons. After that son's decease the sum invested was to fall into the residue; the subsequent dealing with the property was then made the subject of express and minute directions, so that other persons besides the annuitant were provided for; yet the sum invested proving insufficient, the annuitant was declared entitled to have the deficiency made up out of the capital. In *Mills*

¹ 20 Beav. 109.

² 1 Russ. 370.

³ 1 Sim. & S. 463.

⁴ 2 De G., M. & G. 652.

v. *Drewitt*¹ the matter was fully considered, and the same conclusion adopted. There money was given to trustees for investment in the funds sufficient to produce 40*l.* a year to be paid to the testator's wife for life. The general residue and the fund invested were (after her death) to go to other persons. The sum invested produced less than the 40*l.*, and the widow was held entitled to have the deficiency made good out of the corpus. The words of the will create a trust for the benefit of the widow, and no benefit is to arise to other persons until that trust has been performed.

THE LORD CHANCELLOR. — Suppose the money had been lent upon mortgage, according to a power contained in this will, how would the corpus have been affected upon every yearly deficiency of income ?]

There may be in a particular state of things some unforeseen difficulties in complying with the will of a testator, * 622 but that cannot affect the question where the general intention is clear. Here the money was not lent on mortgage, and the supposed difficulty does not arise.

The appellant's counsel were not called on to reply.

THE LORD CHANCELLOR (LORD CHELMSFORD). — My Lords, it is very much to be regretted that in a case in which your Lordships have so clear an opinion with respect to the construction of this will, a conflict of opinions of learned Judges should have occasioned resort to different tribunals, and have led to great expenses, reducing very considerably the small sum which is in question.

There is no principle whatever involved in this case, except that which pervades all these cases, namely, to ascertain what is the testator's intention, and to carry that intention into effect. If the language of this will were to be regarded without reference to the authorities upon the subject, I should feel no difficulty whatever in coming to a conclusion as to the meaning of the testator. And it seems to me that we shall not break in upon any principle whatever in deciding according to the construction for which the appellant contends.

It is clear that the testator was under a misapprehension with regard to the amount of his property, and that he supposed that his estate would enable him to provide a fund, which would pay an annual sum of 200*l.* to his widow, and would leave a surplus ;

¹ 20 Beav. 632.

and, in construing the will, you must endeavour to ascertain the intention of the testator with reference to that circumstance. The words of his will in that view appear to me to be perfectly clear. [His Lordship read the bequest.]

It is quite apparent, from the words of this will, that the intention of the testator was, that the funds which he
 * 623 * thought would enable him to secure the annual payment to his widow should be provided by the sale of his property ; and that she should be paid out of the dividends and interest of that fund, and that he intended that that fund in its integrity, in case of her death or marrying again, should go over to the parties who are named. That being the intention of the testator, your Lordships are called upon, under a state of circumstances never in his contemplation, to give a different construction to the will, and to impose, as it were, a new intention upon the testator ; because, as he clearly contemplated that there would be a sufficient fund to pay this annual sum out of the interests and dividends, and that the corpus of the funds was not to be touched for the purpose of assisting in its payment, you are now called upon to suppose that he had the intention of appropriating a portion of the corpus of the fund, in case the dividends and interest out of which he so declared the annual sum should be payable, should prove to be deficient.

It is quite clear that this is a question, not between an annuitant and a residuary legatee, but between a tenant for life and a remainder man. And the authorities which have been cited clearly mark that distinction, and show, I think, that in this particular case there is no decision which conflicts with that construction of the will, which appears to me, under the circumstances, to be the correct one.

According to the construction which is contended for, on behalf of the widow, this strange state of things would arise, that, supposing her life to continue for many years, the provision which was clearly intended for her by the will, might in the course of time, by appropriating annually a portion of the corpus of the property, be utterly annihilated, and she would be left with-
 * 624 out any provision at all ; * and therefore, as the question is one regarding intention, I apprehend that nobody can suppose that such an intention could ever have existed in the mind of the testator. There are other difficulties which occur in the con-

struction which is contended for on behalf of the widow ; and I think there has been no satisfactory answer given to a difficulty with which her counsel were pressed in the course of the argument. The trustee is at liberty to invest the fund upon mortgage, as well as in government stocks. Now, the fund would clearly be deficient to pay the annual sum of 200*l.* to the widow ; and the question is, in what mode, supposing the money had been invested upon mortgage, the trustee is to supply the deficiency of the fund, and to pay the annual sum of 200*l.* to the widow. It is quite clear that he could not deal with a mortgaged estate in the same way as he can deal with government stocks, by appropriating annually a portion of the corpus of the fund to provide the annual sum of 200*l.*, and therefore, that itself, upon a question of intention, may aid very considerably in giving the other construction which is contended for on the part of the appellant.

Upon the words of the will, it appears to me to be perfectly clear that there is no difficulty at all in arriving at the intention, and ascertaining what was the meaning of the testator ; and therefore, if the question is to be decided apart from authorities, there can be no hesitation whatever upon the subject. With regard to the authorities, the only case that the Master of the Rolls referred to, and by which his decision seems to have been influenced, was the case of *Wright v. Callender*.¹ It was, in fact, a fettered judgment of the Master of the Rolls ; he considered that he was bound by the authority of that case. Now, it is quite * clear, that in cases of the construction of wills, very * 625 little aid is to be derived from authorities. Each case must depend in a great degree upon its own circumstances and language. But with regard to *Wright v. Callender*, there is a clear distinction, as it appears to me, between that case and the present ; because there the trustees were to stand possessed of property, and to invest a sufficient portion thereof in the public funds of Great Britain to provide an income of 2*l.* a week. Now that was not like this case, in which the income is to be paid out of interest and dividends, but it was income that was to be paid at all events ; and upon the death of the person who was entitled to that weekly sum, it was to fall into the residue. Therefore the parties could take no portion of the residue, which had been exhausted for the purpose of satisfying this annual sum which was to be paid weekly to

¹ 2 De G., M. & G. 652.

the party who was named in the will. In that case Lord Cranworth¹ says: "If there had been any thing in the terms of that gift over, showing that the testator intended the fund to be continued in its integrity during the life of the annuitant, and in that state to go over, the argument might be well founded." But in this case there is that very circumstance to which Lord Cranworth adverted as being absent in the case of *Wright v. Callender*, because here it is apparent, from the language of the will, that the testator intended that the fund should be continued in its integrity during the life of the annuitant, and in that state should go over. The trustee is to stand possessed of the "said principal or trust moneys." So that, in fact, he is, as trustee, to hold the fund, and out of the interest and dividends to pay the amount of 200*l.* a year, supposing it sufficient, as the testator thought it would be,

to pay that amount; or if not, he is to pay the whole of
 * 626 * the interest and dividends: that is one trust; and then upon the death of the widow, or upon her second marriage, the next trust is, that he is to stand possessed of "said principal or trust moneys," upon trust for his brothers and sister and himself.

Therefore it appears perfectly clear that this is a case in which all the circumstances concur to show that the intention of the testator must have been to preserve the fund apart and in its integrity as a fund which is to be first applicable to the payment of the annual sum to the widow, and afterwards to go over to those who are in remainder after her. That being so, it really appears that there is no authority which conflicts at all with that construction of the will.

Under these circumstances, I submit to your Lordships that it will be proper to vary so much of the decree of the Lords Justices as declares that the plaintiff is entitled to an annuity of 200*l.*, and that she is entitled to have the deficiency of the dividends made good out of the corpus of the fund, and to give the directions consequential thereupon; and also with regard to costs, that a declaration should be made so as to make the costs payable out of the estate.

LORD BROUGHAM. — My Lords, I take entirely the same view of this case with my noble and learned friend; and I shall not detain

¹ 2 De G., M. & G. 655.

your Lordships by urging any argument in favour of my opinion, which is, that the decree of the Court below ought to be varied, as suggested.

It has been very justly observed, in regard to cases like this, where the sole question that arises is upon the construction of a will, and where the object is to ascertain the meaning of the words used by the testator, that nothing, * generally speak- * 627 ing, can be more unfruitful than a reference to other cases where, instead of the question arising upon a principle of law, or a rule of law, the whole question arose upon the meaning of the words employed in the will ; and the least difference between the case at the bar and the case cited, will make all the difference in the world, and render the application of the case cited utterly useless.

My Lords, reference has been made in this instance to the case of *Wright v. Callender*, which, for the reason given by my noble and learned friend, is clearly distinguishable from this case. I should have had no hesitation whatever in the case of *Wright v. Callender* in taking the same view of it which my noble and learned friend, now sitting upon the bench opposite, took.

With respect to the case of *May v. Bennett*, I cannot go quite so far ; I wish to say nothing in disparagement of that case : it is distinguishable from the present. But, with the greatest possible respect for the learned Judge, the late Lord Gifford, who decided that case, I must say, that if I had had to decide it, I think I should have come to a different conclusion from that at which he arrived.

I have sometimes wished that, as to wills, we might have formulas laid down ; so that if any one chose to use those formulas, they might feel assured of effect being given to them by the law. Many objections have been taken to that mode of proceeding ; but if it were left entirely optional to any one to use the prescribed form or not, a guaranty being given to those who did elect to use it, that they had used words which had a certain defined effect, I have often considered that that might be one mode of avoiding these endless disputes respecting the meaning of words employed in wills and in some other instruments. But that observation rather applies to cases in which questions arise respecting some principle or some rule of law than to those in which

* the question relates to intention alone. In this case it is * 628

the three adventurers on the 8th of that month, Hart's arrears were formally reported, and a new call was ordered, payable immediately. On the 12th December, 1849, Hart wrote to Chapman to announce that he had sold most of his "active shares in the Yewthwaite" mine; and added, "My reserve shares are for sale, and indeed any other part of my mining interest, for the purpose of liquidating the debt against me." In several other letters, Hart repeated that he would not pay his calls until he had sold his shares, and it did not appear that this sale had ever been completed. On the 29th January, 1850, Chapman wrote to Hart a notice of a meeting for the next day, "to arrange about the settlement of the outstanding accounts due on the Goldscope mines, as also to know what is to be done about your arrears of calls." On the 1st February a further call was made, and on the 11th March, Chapman wrote to Hart announcing that Hart's debt to the company amounted to 230*l*. Another call was made, and on the 26th March, Chapman wrote to Hart an account of the condition of the mine, and added that Clarke and he were annoyed that Hart had not made some arrangement for payment of his arrears of calls, and suggested that he should transfer to them a moiety of his shares as an acknowledgment or equivalent. This suggestion was immediately refused by Hart. On the 3d April, 1850, Chapman wrote the following notice to Hart: "I am instructed to inform you that a call of 12*l*. per share has this day been made upon the shares of the Goldscope Mining Company, and to request that such calls, amounting to 16*l*., upon your shares, as well as all arrears due to this date, be paid to the credit of the company at their bankers immediately. I am also desired to give you

* 637 notice that unless the above call and your * arrears are paid on or before the 30th instant, your shares will be declared forfeited in accordance with the company's agreement."

Hart, on the 5th April, wrote in answer: "I beg to acknowledge the receipt of your favour of the 3d instant, and shall be glad to know when I can see the cost book and cost sheets from last October." On the 8th April he wrote another letter, in which he said: "As Mr. Clarke has consulted Mr. Bragg upon the subject of our engagements, you must know, or ought to know, you can only dissolve our partnership with my consent, and that you possess no power to forfeit my shares, of which you are desired to give me notice, unless, &c. — consequently, this but little affects me."

On the 2d May, Chapman wrote to Hart, saying, that as Hart's arrears of calls due to the Goldscope Mining Company had not been paid at that date, the Company had "determined on convening a meeting at this office to-morrow evening at half past five p. m., for the purpose of forfeiting your shares in the property, in pursuance of the notice to you of the 3d ultimo."

Hart, on the 3d May, answered: "I have to acknowledge yours of yesterday's date. As I do not intend to assign any part of our joint leasehold property in Cumberland without I get paid for it, nor to part with it in any other way, unless I get an equivalent value according to my estimate of its worth, I beg to state you are committing another act of folly by the course you are pursuing, and feel confident you will regret having done so, should I be provoked by a continuance of this absurdity. I have before told you, and repeat, you have no power to deprive me of my share of the leasehold property we possess. I have hitherto shown forbearance towards you, in consequence of the unfair proportion of money you * have been obliged to pay on my account; how- * 638 ever, you will recollect I had once an opportunity to sell your shares, as also my own, in this adventure, and that after we had seen the effect of working in Goldscope; this you refused, and thus was I deprived by yourself of the chance (for the first time) of liquidating all claims on me in this undertaking."

On that day, Clarke and Chapman held "a meeting of directors," and passed a resolution which was transmitted to Hart by Chapman, in a letter, dated the 4th May, 1850, and which contained the expression of "a hope that you will be able to settle the matter by the 15th instant, and not cause your shares to be then and there forfeited." The resolution was as follows: "Resolved, that whilst deprecating the tone assumed by Mr. Hart, yet in consideration of the amount he has already expended in the adventure, the company grant an extension of time, with the view of further endeavouring to facilitate the payment of his arrears, or of his making a satisfactory settlement with the company, such extended period to cease on Wednesday, the 15th instant."

On the 6th May, Hart wrote a letter, in which he proposed certain arrangements as to the liquidation of his debt for calls; and observed: "If you can do better than this by your resolutions, you know mine; as you are inclined for peace or war so you will find," &c. Hart made no payment; and on the 31st May, 1850,

it was resolved, that Mr. Hart's shares in the adventure should be, and were then forfeited.

Due notice of this declaration of forfeiture was given to Hart, who did not appear to have made any answer.

On the 26th August, Chapman wrote a letter to Hart, in the course of which he said : " Ever since I wrote you on the * 639 4th May last, relative to your position in the * Goldscope Mining Company, both Mr. Clarke and myself have been very desirous to afford ample time for you to make arrangements for the settlement of your debt to the company, and as we have in our opinion afforded you every opportunity, we must press the matter more particularly to your notice, and request an immediate payment of your liability. Every day is increasing your proportion of cost in the adventure, which we think you should be apprised of, and not let the affair so continue without some notice ; you will perhaps recollect that at one of our meetings in the early part of this year, an offer was made you to give us a release of your share, and in the event of the adventure being successful, we should not forget yourself in the divisions of profits, which then appeared far more probable than at this present time, when the appearance of the mines looks worse than ever. The proposition was rejected, and so we have proceeded on in the old way, paying out of our own pockets the cost that should be met by all the adventurers *pro rata* ; we trust, therefore, you will be able to make us some proposition whereby the affair may be settled, and the irksomeness of all our positions be removed. Mr. Clarke, who is at the mines, promised to send you a statement of your debt. Has he done so ? for if not, I will urge him, when next I write, to do it at once."

Hart did not answer this letter, but waited till the 15th April, 1851, when he wrote thus : " Gentlemen, It was with much pleasure I heard of our success in the Yewthwaite mine, the detailed particulars of which I shall be obliged by your forwarding to me at your earliest convenience, together with the amount of costs incurred in this mine since my last payment, as also the returns for ores sold."

No answer was sent to this letter, and on the 31st * 640 * October, 1851, Hart again wrote, requiring information as to the mines ; threatening, if it should not be furnished, to go down and inspect them, and to charge his journey to their

debit, and speaking of "the interest we possess in common so far as the same mines are concerned." On the 1st November, Clarke answered by referring Hart to Chapman's letter of the 4th May, 1850, and to Hart's own letter of the 27th November, 1849; adding: "Provided you consider yourself entitled to any further information, all I can say is, the law is open to you, and the sooner you prove it the better."

On the 10th November, Hart replied thus: "When I wrote you last it was in the hope that by this time you would have seen the folly of the course you have taken." However, as it appears otherwise, so let it be; we shall be all out of pocket until success shall enable us to repay all that has been expended in this unfortunate speculation. Should brighter days come, and you should resist the payment of my proper proportion of the interest I hold in this property, I shall take advantage of the kind advice you have so gratuitously given, and let the law render me that justice you appear to be so little acquainted with, but I shall not be disposed to consult the Lord Chancellor until our mine or mines yield sufficient to pay law charges: thus, you will observe, you will remain in peaceful possession of your wrong doing until I find your intention to defraud me of my right is manifest by the fact, and then, if not before, you shall hear of your most obedient," &c.

Clarke and Chapman continued to work the mine jointly up to the 31st December, 1851, when an arrangement was entered into, by which Clarke became the sole proprietor of the mines, and worked them at his own expense.

On the 23d April, 1853, Hart's solicitor wrote to the appellants, demanding an account up to that time, and an * inspection of the company's books, which was after some * 641 correspondence refused.

Hart, on the 27th August, 1853, filed his bill in Chancery praying for a dissolution of the partnership, and for an account.

Answers having been put in, the cause came on to be heard before the Master of the Rolls, who was of opinion that there had not been any forfeiture; but who, by a decree dated 9th June, 1854, declared that the joint adventure called the Goldscope Mining Company was concluded, so far as the respondent was concerned, on the 31st day of May, 1850, and directed accounts to be taken on that footing (19 Beavan, 349).

The cause was taken by appeal before the Lords Justices, by

whom the original decree was varied, by striking out the declaration that the joint adventure terminated on the 31st May, 1850. The adventure was ordered to be now determined, and accounts were directed (6 De G., M. & G. 232). The present appeal was then brought.

Sir R. Bethell and Mr. Malins (Mr. Thomas Tapping was with them) for the appellants. — The judgment of the Court below cannot be supported, for, first, the appellants had a right to declare the respondent's shares forfeited, such right being incident to a mining partnership carried on upon the cost-book system; secondly, the forfeiture was duly declared, or at all events, what took place in May, 1850, amounted, if not to a forfeiture, at least to a dissolution of the partnership; and thirdly, the respondent by his own conduct has precluded himself from asking the relief of a Court of equity.

As to the first point: the stipulation between the parties was that the adventure was to be conducted on the cost-book principle.

That necessarily involves the right of the adventurers to * 642 forfeit the shares of a coadventurer who * does not by the payment of his calls contribute to the success of the adventure. The text-books from the old Rhymed Chronicle of Manlove,¹ to Mr. Tapping's prize essay on the subject, clearly establish this right.² The existence of peculiar laws as to mines is recognised by the Legislature, which has excepted mining companies from the operation of the law relating to ordinary joint stock companies, 7 & 8 Vict. c. 110, § 63; 14 & 15 Vict. c. 94; 15 & 16 Vict. c. 163,

¹ Edited by Tapping, lines 113 to 120 :

“ And two great Courts of Barghmott ought to be
In every year upon the minery,
To punish miners that transgress the law,
To curb offenders, and to keep in awe
Such as be cavers, or do rob men's coes,
Such as be pilferers or do steal men's stows.
To order grovers, make them pay their part,
Joyn with their fellows, or their grove desert.”

The appellants contended that “desert” here meant “give up, forfeit.”

² The Readwin Prize Essay, p. 37. See also Pearce's Stannary Laws, ed. 1725, p. 26, § 19. Bainbridge on Mines, 628, § 9. Tapping's Derbyshire Mining Customs, p. 27. Treatise, High Peak Customs, p. 21. The Mineral Courts Act of 1851 (14 & 15 Vict. c. 94), cl. 20, of the First Schedule.

and 18 Vict. c. 32, § 22. The customary right of forfeiture of shares of a defaulting coadventurer, is absolutely necessary for the successful carrying on of a mining adventure ; for where so much is risked, and where property often lies for so long a time utterly unprofitable, where large advances are required to obtain the very first and smallest gains, and each adventurer may sell without a veto from the others, nonpayment of the early calls may be destructive of the whole adventure. A rapid and effective remedy for such an evil is therefore absolutely required, and the power of declaring a forfeiture alone supplies it. In *Williams v. Attenborough*,¹ Lord Eldon recognised mining property as being different from any other, and acted on that difference, and so did the full * Court of Appeal in *Fenn's Case*.² This House has * 643 held that a course of dealing between the members of a company will be binding on all who belong to it, *Bargate v. Shortridge*.³ In this particular case, the respondent in conversations, as the appellants allege, though he denies the fact, and in the letter of November, 1849, which he cannot deny, affirmed the power of forfeiture for nonpayment of calls. Though, therefore, it may be true, as Lord Justice Turner observed, that "there was an absence of any special provision for that purpose," still the nature of the agreement itself, and the respondent's own written declaration, establish the right. This right is not one which is to be dealt with as *strictissimi juris*, like the case of a forfeiture of an estate at law ; but being established by custom, acknowledged by the parties, and recognised by the Legislature, is to be treated as one of the ordinary incidents of a mining partnership.

Assuming the power of forfeiture to exist, it has been duly exercised (the evidence given in the cause was fully referred to in support of this argument) ; or, at all events, what was done in May, 1850, amounted to a dissolution of the partnership.

Whether there has been a forfeiture or a dissolution of partnership, the conduct of Hart has been such as to disentitle him to relief in equity. It is inequitable to leave his coadventurers to bear the whole labour and expense, and then, when they have won a profit, to ask to share their gains ; and a Court of equity will not assist him in such an object, *Parrott v. Palmer*,⁴ *Bowser v. Colby*.⁵

¹ Turn. & Russ. 70.

⁴ 3 Mylne & K. 632.

² 4 De G., M. & G. 285.

⁵ 1 Hare, 109.

³ 5 H. L. Cas. 297.

In *Prendergast v. Turton*,¹ the plaintiff had lain by in
 * 644 * the same manner, and Lord Lyndhurst, in dismissing the
 bill, said, "This Court can never sanction this sort of conditional acquiescence." The rule on this point is the same at law, and was thus laid down in *Pickard v. Sears*,² that "where one, by his words or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." [LORD WENSLEYDALE. — That expression of the rule is qualified in *Freeman v. Cooke*.³ The conduct must amount to a license or agreement.] It does so here. In *Watson v. Reid*,⁴ a delay of a year was held fatal to a claim for enforcing an agreement; and in *Eads v. Williams*,⁵ a delay of three years was held sufficient to prevent the Court from granting specific performance of an award. *Clegg v. Edmondson*⁶ proceeded on the same principle, and relief was refused after long delay, which was treated, as it ought to be treated, as evidence of a desire to take profits if they should be made, but to escape loss if it should be incurred; and that was deemed so inequitable as to bar the plaintiff of all claim to relief; there, too, the continual claim put in by the plaintiffs was not allowed to influence the result. In *Clements v. Hall*, which occurred only some days ago,⁷ it was declared by the Lord Chancellor, in the full Court of Appeal, that, where a partnership business was of a speculative character, *ex gr. mining*, and a surviving partner continued it in his own name, renewing a lease, &c., the representative of the deceased partner took no interest unless he was ready to contribute.

* 645 * The circumstance that a legal interest in the lease of the mine existed in *Hart* was referred to by Lord Justice Turner,⁸ as one that warranted the interference of the Court in his favour; but Lord Eldon repudiated any such rule in *Norway v. Rowe*,⁹ and a legal interest in the lease of a mine can be no more important for such a purpose than a legal interest in the steam

¹ 1 Younge & C. Ch. 98, S. C. on Appeal, 13 Law J. N. S. Ch. 268.

² 6 A. & E. 469, 474.

³ 4 De G., M. & G. 674.

⁴ 2 Exch. 654.

⁵ 26 Law J. N. S. Ch. 673.

⁶ 1 Russ. & M. 236.

⁷ 6 Weekly Reporter, 358, 27 Law J. N. S. Ch. 349.

⁸ 6 De G., M. & G. 253.

⁹ 19 Ves. 144.

engine that works the mine, which certainly would not have entitled Hart to relief. According to the ordinary principles of equity, this bill ought to have been dismissed, *The Marquis of Townshend v. Stangroom*.¹ Even the Lords Justices themselves stated that there was great doubt about the matter, and Lord Justice Knight Bruce felt and expressed this very strongly in his judgment in this case; and added, "I am not sure but that this bill ought to have been dismissed." That would have been the proper course for the Court to follow, and the present decree pronounced in opposition to those doubts cannot be supported.

Mr. R. Palmer and *Mr. Wellington Cooper* for the respondent. — The power of forfeiture claimed in this case is *strictissimi juris*; it must exist by statute or by the clear terms of a contract. Neither statute nor contract has created it. The letter of the respondent in November, 1849 (written after the contract of partnership was made), at most amounts to a statement of his belief that his shares would be liable to forfeiture; but the weight of the general evidence is against that supposed rule, nor can any opinion as to the effect of a contract already made at all affect its operation. *Fenn's Case*² does not apply here, because there a notice was given, and that notice was in exact conformity with * the * 646 agreement on which the partnership was founded, which certainly cannot be said here.

It is denied that liability to forfeiture is necessarily incident to mining partnerships worked upon the cost-book principle; it exists perhaps in favour of the landlord as against his tenant, but that liability would not affect a partnership like the present. Even the words in *Manlove* do not amount to proof of a universally established custom of forfeiture; they show only a loss of the grove upon a judicial decision, not by the act of the partners. If the right of the partners to declare a forfeiture existed as an established legal custom, the 18th section of the 6 & 7 Wm. 4, c. 106, would have been unnecessary. That section authorises the Vice-Warden to direct the sale of the share of a person who has not paid the money due from him in respect of the working or management of the mine, and to apply the produce of the sale in making good the order of the Court. The 19 & 20 Vict. c. 47, is another illustration of the same argument.

¹ 6 Ves. 338.

² 4 De G., M. & G. 285.

The mining laws of Devon and Cornwall are in accordance with this view of the matter; those laws allow of forfeiture in only one case, and that is where there has been a fraudulent abandonment of the mine by the tenants, in which case it may be resumed by the landlord,—the Stannary Laws.¹ In all other cases the land of the defaulting party may be let, and the produce applied to pay off his liabilities; if there should be a surplus it would go to him; if not, his coadventurers have their remedy against him for the loss.

But even if it should be assumed that the right of forfeiture existed, it has not been strictly exercised here. To be validly * 647 enforced it must be exactly followed, * *Cockerell v. The Van Diemen's Land Company*.² There the right had been expressly reserved, but the preliminary proceedings not having been duly observed, it was held that no forfeiture had been effected. Here the appellants did not proceed with the necessary strictness. [The evidence was referred to at full length to show that only one formal notice of forfeiture had been given, and that that notice had not been acted on, but, on the contrary, time had been given to the respondent to pay up what was owing, and that the declaration of forfeiture made on the 31st of May was made on that day without any notice of a meeting for that purpose.]

But then the respondent is said to have deprived himself by his own laches of asserting any equity against the appellants. On that point there are two classes of cases which must be kept distinct from each other; the first is, where a man comes to establish a trust or to assert a claim of a matter of which he is not in possession, as for the specific performance of an executory contract; and the other where he has a vested interest in, or an actual possession of property, of which he has been wrongfully attempted to be deprived. The cases relied on by the other side to show that there must be no delay in asserting a right, are those of the specific performance of executory contracts in which it is not denied that a party must come promptly, or he will lose his right of applying to a Court of equity for relief; but where he has a vested right in, or is in actual possession of property, and an attempt is made wrongfully to deprive him of either, the only question is, whether what he has done amounts to such conduct as is a waiver or a release of his existing right. *Clegg v. Ed-*

¹ Pages 18, 26, 40, 195, 214.

² 18 C. B. 454.

mondson,¹ * *Norway v. Rowe*,² and *Senhouse v. Christian*, * 648 cited there,³ and *Clements v. Hall*,⁴ are cases which illustrate this distinction, and on it those decisions are easily explainable. But in a case like this there must be what Lord Justice Turner called "a purpose of abandonment," before the excluded partner can be treated as having his legal right barred. All the evidence shows that this respondent had no such purpose, but a settled determination to hold to his rights; his letter did not in any manner affect or alter the conduct of the appellants, and consequently has not thereby injured his own rights. *Pickard v. Sears*,⁵ which was qualified in *Freeman v. Cooke*,⁶ and *Howard v. Hudson*,⁷ are all authorities to show that under such circumstances his rights remain as before. There was not here any dissolution of the partnership; if there had been, the whole concern must have been wound up and the effects distributed, *Featherstonhaugh v. Fenwick*,⁸ *Crawshaw v. Collins*,⁹ *Cook v. Collingridge*,¹⁰ and *Wedderburn v. Wedderburn*.¹¹ The working of mines must always be considered a species of trade, *Jefferys v. Smith*,¹² *Bentley v. Bates*,¹³ and so long as there was a legal title in the respondent to his portion of the partnership assets, he could not be excluded from the partnership without a winding-up of the whole concern. He had such a legal title here; and for the purpose of ascertaining the different rights of the parties, a Court of equity is the fittest tribunal, since such a Court will not restrict its protection * to the legal estate, but will do full justice on a considera- * 649 tion of all the circumstances of the case, *Colyer v. Finch*.¹⁴

Sir R. Bethell replied.

March 23.

THE LORD CHANCELLOR (LORD CHELMSFORD), after fully stating the facts, said: The first question is, whether it is inherent in the cost-book system, as recognised in Cornwall and Devonshire, that

¹ 3 Jur. N. S. 393, 26 Law J. N. S. Ch. 673.

² 19 Ves. 144.

³ 19 Ves. 157.

⁴ 6 Weekly Reporter, 358, 27 Law J. N. S. Ch. 349.

⁵ 6 A. & E. 469.

⁶ Jac. 619.

⁷ 2 Exch. 654.

⁸ 2 Keen, 722, 4 Mylne & C. 41.

⁹ 2 Ellis & B. 1.

¹⁰ 1 Jac. & W. 298.

¹¹ 17 Ves. 298.

¹² 4 Younge & C. Exch. 182.

¹³ 15 Ves. 218, 2 Russ. 325.

¹⁴ 5 H. L. Cas. 905.

where a party is in default for calls which have been duly made, the coadventurers have a right to declare a forfeiture of his shares. Upon this subject we were pressed with various treatises with respect to the cost-book system, with passages from the Stannary Laws, and with Acts of Parliament relating to joint stock companies, in which clauses allowing the forfeiture of shares for default were introduced, and also with *vivâ voce* evidence which was produced for the purpose of establishing that position. It was insisted that it was reasonable and almost necessary that there should be a power of this kind inherent in the system, because inasmuch as any one of the parties might part with his shares without a *veto* by the other partners, it was contended that they ought to have that check and control which would enable them, in case the shares were assigned to a person who was incapable of paying his quota, to declare the forfeiture of his shares. If it was necessary for me to come to any opinion with respect to this power to forfeit arising from all these considerations which have been pressed upon your Lordships, I confess that the conclusion of my mind would be, that there is no satisfactory evidence to establish any such power inherent in the system itself, but that undoubtedly, it being a very reasonable and almost a necessary power

* 650 * for parties to have an opportunity of exercising, if it is required, it should be inserted as a stipulation in the agreement. And that appears to me to be the result of the evidence upon the subject. I lay no stress at all upon the admission that was made by the plaintiff with regard to the other parties possessing this power, and which is contained in the letter so often referred to of the 27th November, 1849, because I am of opinion that, supposing it not to be established that such power necessarily belongs to the system in question, a mere admission by one of the parties at a period subsequent to the entering into the agreement would not alter that agreement, and make that a stipulation which was not a part of the agreement originally. And therefore I am clearly of opinion that the statement contained in the letter which has been referred to ought to have no weight with your Lordships.

I think, however, it is quite unnecessary to express any decided opinion upon the point of whether this power was possessed by the coadventurers upon this occasion, because upon the second point to which I shall have to address your Lordships' attention, I

am clearly of opinion that, supposing that power to have existed, it has not been duly exercised, and that there has been no proper resolution by which the appellants could declare the shares of the respondents to be forfeited. It is unnecessary to advert to the principles that forfeitures are *strictissimi juris*, and that parties who seek to enforce them must exactly pursue all that is necessary in order to enable them to exercise this strong power. With regard to this particular case it seems to be admitted both by the answers and by the evidence on the part of the appellants, that the only proper mode of declaring a forfeiture was by convening a general meeting after the period limited for the payment of the calls and the party being in default, that general meeting being * necessarily to be preceded by notice to all the adventurers * 651 to enable them to attend it, and also (as appears to have been conceded at the bar) by a notice of the intention for which the meeting was convened.

There can be no doubt whatever that Hart was in arrear with his calls. They had been duly made. Hart was present either at the meetings where they were resolved upon, or at meetings at which the previous making of them was sanctioned. He had due notice of them, and he was in default. Then, assuming the right to forfeit, the parties might, after the time limited for payment of a call, have convened a general meeting, and have declared the shares to be forfeited. The question is, whether they did so. It seems, that on the 3d of April, 1850, a notice was served upon Hart that his shares would be forfeited unless he paid the arrears of calls on or before the 30th instant. In a letter of the 8th of April, 1850, he denied the right of his coadventurers to forfeit his shares. On the 15th of April a meeting was held, at which meeting it was stated, he being present, that notice had been given to him, that unless the calls were paid on or before the 30th instant his shares would be forfeited. There can be no doubt, therefore, that assuming the right to forfeit after that notice had been given, and the time limited for the payment of the calls had expired, it would have been competent to the appellants to convene a general meeting, and to declare a forfeiture of the shares. They could not have done so before the end of the day of the 30th of April, because Hart had the whole of that day in which to pay the calls; and it seems that the coadventurers understood what was the regular course to be pursued, because, on the 2d of May, 1850, they gave

Hart notice that on the following day it was their intention to assemble a meeting of the adventurers, and there to declare
 * 652 the shares to be forfeited; and * if they had followed out their original design, and had, on the 3d of May, 1850, made a resolution that the shares were forfeited for nonpayment of calls, according to their view of their rights, they unquestionably might in that way have determined his right in the shares; but instead of that, the parties assembled on the 3d of May, 1850, and came to a resolution that "for the purpose of facilitating the payment of the calls" by Hart, they would extend the period for payment to the 15th instant. It is quite clear, therefore, that the time then limited for the payment of the calls was the 15th of May; and even upon their own view of what their rights were, they had no power whatever to determine Hart's interest in the mines without convening a general meeting after the expiration of the 15th of May, and then declaring the forfeiture of the shares.

Now, it is said that such a meeting was held on the 31st of May, and that at that meeting a declaration of the intended forfeiture was made. There is no evidence whatever that any notice was given of that meeting, nor does it appear that any intimation was given to Hart that such a meeting had been held, and that his shares had been declared to be forfeited. And there is something rather remarkable in the history of this meeting of the 31st of May, because it does not appear to be entered at all in the cost-book. It is never adverted to in the correspondence which takes place between the parties at the time when Hart was insisting upon his rights, and the first appearance of it in any book or document is of the late date of April, 1852, at a period when, to adopt an expression that was used at the bar, the parties were at arms' length, and when Chapman, one of the appellants, was parting with his interest to his coappellant, Clarke; and we must never lose sight of that letter which was written on the 26th of August, 1850, which, whatever may be the construction attempted to be
 * 653 * put upon it, to my mind clearly conveys the idea that the parties considered that the interest of Hart had never been put an end to, but that he continued to be a shareholder in the concern, because in that letter of the 26th of August, Chapman says — [His Lordship read the letter, see *ante*, p. 638.] It appears to me that that letter is utterly irreconcilable with the notion that on the 31st of May, by the exercise of a power which be-

longed to the appellants, they had declared a forfeiture of Hart's shares.

Then there is another circumstance which ought to be adverted to, which also shows that the parties have never insisted upon any resolution of the meeting of the 31st of May, 1850, as having the effect of forfeiting Hart's shares ; because, in the year 1851, when Hart knew that the parties had determined on displacing him from his interest in the mine, and when he was insisting that they had no right to do so, he is answered by a letter of the 1st of November, 1851, in which he is referred to Mr. Chapman's letter of the 4th of May, 1850, and also to his own letter of the 27th of November, 1849. Now that letter of the 4th of May was a letter enclosing a resolution of the meeting of the 3d of May, 1850, which resolution was not to declare that his shares were forfeited, but to extend the time for the payment of the calls until the 15th of May. With respect to the letter of Hart himself of the 27th of November, that merely referred to an admission which was made by him, that his coadventurers had the power to declare the shares to be forfeited. And it does seem most remarkable, if this meeting was held, and if, according to the view which the parties entertained of their rights, a forfeiture of Hart's shares had been resolved upon, that in the course of the whole of this angry correspondence they never should have said to him, How can you insist upon your claim to any shares in this adventure, when, according * to your own admission, we were em- * 654
powered to declare your shares to be forfeited, and we did declare them to be forfeited at the meeting held on the 31st of May, 1850.

It appears to me, therefore, exceedingly doubtful whether any such meeting was ever held ; at all events it is clear that no formalities and no preliminaries were observed which were necessary to make that a meeting at which any resolution to forfeit shares could have been come to. It is clear, therefore, upon a view of all the circumstances connected with the assumed forfeiture of these shares, that supposing the right exists, yet, according to the admission of the parties, there were certain formalities to be observed which have not been attended to in this case, and that, therefore, there has not been a proper exercise of the right that would displace Hart from his interest in this concern.

But the Master of the Rolls expressed an opinion that although

the resolution of the 31st of May, 1850, was inefficient for the purpose of declaring a forfeiture of the shares, yet that it might amount to a dissolution of the partnership. Now, I confess that I am at a loss to see how that which was intended to work a forfeiture of shares, and which is inoperative for that purpose, can be rendered available to create a dissolution of the partnership. The object of the appellants was not to determine the adventure altogether, and to wind it up as between them and Hart, but to get rid of Hart as a partner, to take his shares to themselves, and to carry on the concern without his intervention. It is therefore clear that, it not being the object of the parties that any proceedings at this meeting of the 31st of May, 1850, should operate as a dissolution, but should be directed to a totally different object, you cannot convert the proceedings into a dissolution of the partnership between those parties, nor can the interest of Hart be in any way affected by them. Hart, therefore, continued

* 655 * to possess his vested interest in the mine. The question then arises, whether there is any thing in his conduct which disentitles him to apply for aid to a Court of equity? Upon this subject it is necessary to consider a distinction which was suggested during the argument, which must be borne in mind, and which, in my opinion, will reconcile the authorities upon the subject. The distinction to which I advert was that which has been expressed very shortly and very intelligibly by the difference between "executed" and "executory interests." Where a person is obliged to apply for the peculiar relief afforded by a Court of equity to enforce the performance of an agreement, or to declare a trust, or to obtain any other right of which he is not in possession, and which may be described as an executory interest, it is an invariable principle of the Court that the party must come promptly, that there must be no unreasonable delay. And if there is any thing that amounts to laches on his part, Courts of equity have always said, We will refuse you relief. With regard to interests which are executed, the consideration is entirely different. There mere laches will not of itself disentitle the party to relief by a Court of equity; but a party may by standing by, as it has been metaphorically called, waive or abandon any right which he may possess, and which under the circumstances, therefore, a Court of equity may say he is not entitled to enforce.

With respect to the waiving or abandoning of a right, it is neces-

sary to understand precisely what is the qualification which has been introduced by the case of *Freeman v. Cooke*¹ into the doctrine of the law as it was laid down by Lord Denman in the case of *Pickard v. Sears*.² Lord Denman in that case of *Pickard v. Sears*, says, * “The rule of law is clear, that where one * 656 by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.”

In the case of *Freeman v. Cooke*, Mr. Baron Parke, in delivering the judgment of the Court of Exchequer, qualified that proposition by saying, “In most cases the doctrine in *Pickard v. Sears* is not to be applied, unless the representation is such as to amount to the contract or license of the party making it.” So that I apprehend, where there is a vested right or interest in any party, the principle of law as now firmly established is, that he cannot waive or abandon that right, except by acts which are equivalent to an agreement or to a license.

The case of mines has always been considered by a Court of equity as a peculiar one. The property is of a very precarious description, fluctuating continually, sudden emergencies arising which require an instant supply of capital, and in which the faithful performance of engagements is absolutely necessary for the prosperity and even the existence of the concern. And, therefore, where parties under these circumstances stand by and watch the progress of the adventure to see whether it is prosperous or the contrary, determining that they will intervene only in case the affairs of the mine should turn out prosperous, but determining to hold off if a different state of things should exist, Courts of equity have said that those are parties who are to receive no encouragement; that if they come to the Court for relief, its doors shall be closed against them; that their conduct being inequitable, they have no right to equitable relief. And with respect to all the cases which were cited at the bar, with the exception of *Prendergast v. Turton*,³ it will be found that they were cases * 657 where it was necessary for the parties to apply to equity for the peculiar relief which it affords where parties are not in posses-

¹ 2 Exch. 654.

² 1 Younge & C. Ch. 98.

³ 6 A. & E. 469 - 474.

sion of an interest, or where they desire to have a trust declared. That was the case in *Senhouse v. Christian*,¹ cited in *Norway v. Rowe*,¹ and in *Clegg v. Edmondson*.² In all those cases it will be found that the parties who continued to carry on the adventure had obtained a fresh lease or other interest which was vested in them. And in all those cases the application to the Court of Equity was to declare the parties who held the leases or other interests to be trustees for those persons who had been in that way excluded. And in such a case the observations which were made by Lord Eldon in *Norway v. Rowe*, and by Lord Longborough in *Senhouse v. Christian*, and by Lord Justice Turner in *Clegg v. Edmondson*, are peculiarly appropriate. The parties come to seek to enforce a right which they can obtain only through the intervention of a Court of equity. If they do so in a case in which they have been guilty of great laches, and in most of those cases what may be considered fraudulent laches, then, according to every principle of a Court of equity, the Courts have said, We will not give you that relief which you pray ; we will not direct that the party who holds the lease or other interest shall be a trustee for you.

The other case which has been cited at the bar, and which is not a case of an executory interest (as in the three cases which I have just mentioned were), but was the case of an interest still remaining vested in the party, was the case of *Prendergast v. Turton*.³

In that case there had been a power contained in the deed * 658 to declare the * shares to be forfeited ; but the directors had not pursued the course pointed out by the deed, nor had they any power whatever to declare the shares to be forfeited by reason of nonpayment of calls, beyond the amount of the shares for which the parties had subscribed ; but notice that a forfeiture had been declared was given ; and although there had been a good deal of altercation upon the subject, the parties whose shares had been declared forfeited, and who were duly informed of the fact, had never taken any steps whatever to assert their right, but from the year 1828 down to the year 1837, a period of nine years, had allowed their coadventurers to go on expending large sums of money, and carrying on the concern without their interference, or without any aid from them, never intimating that they claimed any interest in

¹ 19 Ves. 144, 158.

¹ Young & C. Ch. 93.

² 26 Law J. N. S. Ch. 673.

it. At the expiration of that long period they filed a bill for the purpose of obtaining their rights in the concern ; and then, both by the Vice-Chancellor and by Lord Lyndhurst upon appeal, a strong opinion was expressed, not that the parties had by laches disenabled themselves from applying to a Court of equity for relief, but that their conduct amounted to an abandonment of their right, within the principle of those authorities to which I have referred. And after very strong observations as to the inequitable conduct of those parties who were lying in wait, as it were, to watch the progress of the concern, and then appeared only at the prosperous moment, the Courts declared that conduct to amount to an abandonment of their interest, and therefore dismissed their bill.

I mention the distinction between those cases of *Senhouse v. Christian*, *Norway v. Rowe*, *Clegg v. Edmondson*, and this case of *Prendergast v. Turton*, for the purpose of showing that the last proceeded entirely upon that principle of the party having abandoned his right, and not upon the notion of any laches on his part. *Prendergast v. Turton* * is the only authority * 659 which appears to me to be applicable to the state of things in this case. There the shares remained vested in the parties—here the plaintiff's interest has not been disturbed ; but the distinction between this case and the case of *Prendergast v. Turton* appears to me to be this: In *Prendergast v. Turton* there was distinct notice given to the party that his shares were forfeited, and he took no steps whatever to assert his interest for a period of upwards of nine years. In this case there was not only no such notice given to the plaintiff, but that letter of the 26th of August, 1850, was quite sufficient to induce him to believe that he still continued to be a partner in the concern ; that his shares had never been forfeited, and that therefore there was no necessity for him to do more than assert his rights, as he did in the correspondence which took place between the parties upon the subject of the forfeiture of the shares.

It is said that the conduct of the plaintiff, as declared in his letter of the 10th of November, 1851, is most inequitable. He says: "Should brighter days come, and you should resist the payment of my proper proportion of the interest I hold in this property, I shall take advantage of the kind advice you have so gratuitously given, and let the law render me that justice you appear to be so little acquainted with ; but I shall not be disposed to consult the

Lord Chancellor until our mine or mines yield sufficient to pay law charges." But at all events that was not at all like a person standing by and inducing another to believe that he was in a different position with regard to his interests than he really was. Is it not a most distinct intimation to the parties of the course which the plaintiff intended to pursue, calling upon them, and challenging them to take some steps to oppose the claim which he was making, supposing they could successfully do so? So far from

* 660 there * having been any acquiescence, or from there having been any thing like waiver or abandonment of his right, that right has been invariably insisted upon; and in this respect the case is distinguishable from *Prendergast v. Turton*, because there the parties lay by, and never intimated any intention whatever upon the subject, and they gave the adventurers who were carrying on the concern reason to believe, for the long period that they did not intervene, that it was not their intention to assert any of their rights.

This being, therefore, the result of my consideration of all the facts of the case, it appears to me, in the first place, extremely questionable whether a power of forfeiting these shares existed in the appellants. But in the next place it is quite clear, according to my view, that if the appellants possessed that power they did not duly exercise it; and that, being so, the plaintiff continued in possession of his shares; and there is nothing in his conduct which can amount in my judgment to a waiver or an abandonment of his right. Upon the whole, therefore, it is my opinion, and I submit to your Lordships' judgment, that the decree of the Lords Justices ought to be affirmed, and that the appeal should be dismissed, with costs.

LORD BROUGHAM. — My Lords, had my noble and learned friend stopped short before the last two words of his very able and luminous judgment, I should not have troubled your Lordships with a single remark. What I am about to state has reference to the last two words of that able statement of my noble and learned friend, in all other parts of which I entirely concur: I mean those last two words, "with costs." My Lords, costs are, in all Courts of equity, a matter in the discretion of the Court, a discretion which, like all other judicial discretions, is to be exercised soundly

* 661 * and upon principle. In this case I have the misfortune to

differ from my noble and learned friend in this respect, that I think this appeal ought to be dismissed, but without costs.

There are peculiar circumstances in this case. In the first place there was a decree at the Rolls in great part in the favour of the present appellants (the defendants there), in some part against them. A petition, not by him, but by the respondent, was presented, in the nature of an appeal for a rehearing, and the Lords Justices reversed the decree of the Master of the Rolls, as far as it was in favour of the present appellants, and affirmed it almost entirely as far as it was against them. I by no means intend to state, for it would be a most inaccurate view of the question of costs, that a difference among the Judges of the Court from which the appeal comes to your Lordships is of itself a sufficient ground for refusing the costs of the appeal. Therefore the mere difference between the Master of the Rolls and the Lords Justices upon this subject, and the subsequent difference of opinion between the Lords Justices, is not alone a sufficient ground to refuse the costs of this appeal. But there is a second circumstance to be considered, and that is the manner in which the case was disposed of at the Rolls. Nothing can be more fair or candid than the opinion given by Lord Justice Knight Bruce upon this subject, yet it leaves no doubt whatever in my mind that he had very considerable hesitation, and very considerable doubt upon his mind, in arriving at the conclusion at which he did ultimately arrive. And Lord Justice Turner also appears to have entertained no little doubt upon the subject, for he says,¹ "Looking at the present case in this point of view, I have, though not without considerable doubt, arrived at the conclusion that this plaintiff is entitled to * relief." Then * 662 he goes on to state the circumstances which go to fortify him in the conclusion at which he has arrived: "I am the more satisfied with the conclusion at which I have arrived," and so forth; and then, "I certainly cannot see my way to declare him a trustee of that interest," and so forth. And then he says, "Although, therefore, I think the plaintiff is entitled to relief, I think he is not entitled to it to the extent that is asked."

This, then, is a second circumstance in the case which makes me hesitate, and more than hesitate upon the question of giving the costs of this appeal. And a third circumstance, and perhaps the most material of all is, the conduct of the respondent Hart, the

¹ 6 De G., M. & G. 252.

plaintiff below. Taking the whole of that conduct together, though I quite agree with my noble and learned friend that it does not amount to waiver, though it does not amount to such acquiescence, and such laches or standing by as disentitles him to relief, yet, taking his whole conduct together, including the letter of the 27th of November, 1849, and bearing in mind that these circumstances were all to come before the appellants in considering whether they should appeal or not, and to come before their learned advisers in their consideration of that question — taking all these circumstances together, and putting the question to myself, — should you or not have advised this appeal? — I cannot help feeling that, under these circumstances, and upon these three grounds, each of which separately would not have been sufficient to entitle me to give that counsel, yet, taking all the three together, I should without hesitation have advised this appeal. And therefore, upon that ground, my opinion is, that the decree of the Court below should be affirmed, and the appeal dismissed, but not with costs. Of course, as to the costs below, the appellants had the benefit of the judgment in their favour.

* 663 * LORD CRANWORTH. — My Lords, I do not feel it necessary to add much to what fell from my noble and learned friend on the Woolsack as to the main matter in this case. The first question is, Whether there was a right of forfeiture? Whether or not, according to the terms of the contract, the parties were entitled to declare a forfeiture depends upon two points: first, whether, according to the cost-book principle, there was such a right? and if not, then, whether by the conduct of the respondent Hart, he is estopped from saying there was not such a right by reason of his having done that which led the other partners to believe that he had entered the partnership with the admission, on his part, that they should deal upon the footing of there being such a right.

Now, as to the first question, Whether, according to the cost-book principle, there is necessarily such a power of forfeiture, I am of opinion that it is not made out there is any such power. There is a conflict of evidence upon that subject, but the conclusion at which I have arrived upon the matter of fact is, that no such power exists. It is almost a universal practice in drawing deeds for the purpose of establishing a cost-book partnership, to introduce such a power; but that does not make it a part of the

cost-book system. It is only a clause which is very commonly introduced.

Then comes the question, Was the conduct of the respondent such as to preclude him from saying that there was not to be such a power in this partnership? Upon that subject I cannot but remark that that is a point never set up by either of the defendants, the present appellants, in their answer. They do not say that they entered into the partnership upon such a supposition. * And I cannot help apprehending a little that that * 664 was a matter which they (honestly very likely) insisted upon afterwards in consequence of the letter of the 27th of November, in which Hart had adverted to that as being one of the principles of the cost-book system, and as to which I have no doubt, according to the statements of these appellants, and also the statement of Horn, there had been conversations from time to time before the partnership was formed, but no such conversations as were meant to bind or did bind any of the partners. It appears to me, therefore, that there is no proof established that there was, under the cost-book system, any such power necessarily inherent in the mere fact of a cost-book partnership, and that there was no such representation by Hart as binds him not to dispute the fact of there being any such power in the partnership.

I also concur in thinking, that if there had been such a power, there was no valid declaration of forfeiture, because I cannot agree to the argument of Sir Richard Bethell, that this question is not here to be decided exactly upon the same principle as a strict forfeiture at law. In my opinion there is no difference. The result of the forfeiture is, as the word imports, that the whole property which the partner, whose interest is forfeited, holds in the concern, goes to the other persons engaged in the partnership. And whether or not circumstances have arisen which give rise to that right on the part of those other persons, is a question to be decided upon strict principles of law, just as if it were a question as to the forfeiture of an estate at common law. I think, in this case, that no right of forfeiture existed, and that even if any right of forfeiture existed there was no forfeiture properly declared.

With regard to the declaration of forfeiture said to have * been made on the 31st of May, 1850, as a matter of fact * 665 I arrive at the conclusion that no such declaration was ever made. I do not mean that the other two partners did not meet,

and say something or do something which they thought warranted them in saying that there was on that day a declaration of forfeiture; but that there was no such formal declaration of forfeiture as was necessary for this purpose is, to my mind, satisfactorily made out by this fact, that it is not pretended that there was any entry of the sort, not in the cost-book, for the cost-book was not the place in which to make the entry, but in the minute-book, in which all the other entries were made. There is no entry there of that most important declaration, if it ever took place.

Then, that being so, and there having been no forfeiture properly so called, what is the result of the acts of the partners which took place in the months of April and May, 1850, and what followed? I think they amounted to this, that the two other partners, Clarke and Chapman, intimated to Hart that they no longer meant to go on with him, that they considered that his shares were forfeited. His conduct upon that was this: he said, "I dispute your right; I deny that my shares are forfeited, and you must proceed as you think fit." Now, after that the result was, that if they choose to go on trading, then according to all the ordinary principles of equity, they were trading on behalf of the partnership. I do not think it material to enter into the question whether the Master of the Rolls was right in saying that the declaration of forfeiture amounted to a dissolution of partnership—the consequence will be exactly the same either way; because, if the other two partners, instead of saying, "We declare your shares forfeited," had said, "We hereby dissolve the partnership," and they had

* 666 afterwards gone on trading, they could not * trade otherwise than for the benefit of themselves and their partner whom they had wrongfully excluded. And, therefore, I felt in the course of the argument that all the contest upon that subject was a contest which was *nihil ad rem*, because, whether it was a declaration of forfeiture or whether it was a declaration which amounted to a dissolution of partnership, it was followed by the carrying on of the partnership as it had been carried on before, and, of course, a carrying it on for the benefit of those who were partners at the time the declaration was made.

Then this argument was put: this might have been all very well if Hart, the excluded partner, had earlier asserted his right; but he has lost his right by lying by. Now, for that proposition I can find no authority either in principle or in argument, because the

person wrongfully excluded had from the first moment denied their right to exclude him ; he had said expressly, I deny your right to exclude me ; I shall remain a partner. Then, a few months afterwards, one of the partners writes to him and says, " Your liabilities are increasing every day." That clearly amounts to a recognition of his continuing a partner. It is said that that letter was not from the partnership, but only from one of the partners ; but it is a letter from one of the appellants, and therefore I think it is just the same for the purpose of this argument, as if it had come from both of them.

Then a correspondence takes place at longer intervals, and I have no doubt that the reason why Hart did not move more actively was, that he was not in a position to pay the calls ; but I think that if the other partners who wished to exclude him meant to get rid of him from the partnership, they had but one course to pursue, and that was to file a bill and have the whole concern wound up, which they had a clear right to do, because the circumstance * of his being in default with his calls put it * 667 in their power, if they had taken proper steps, to put an end to the partnership. That course was not taken till this suit was instituted for the dissolution of the partnership, upon which a decree, made by the Lords Justices which I think is the proper decree, and one which your Lordships ought to sustain.

With regard to the costs, I confess that I have had some doubts upon that subject, but upon consideration the result of my opinion is, not to concur with my noble and learned friend opposite. I think that the general principle upon the subject of costs is, and ought to be, that which was often laid down and acted upon by Lord Cottenham, that the costs ought never to be considered as a penalty or punishment, but merely a necessary consequence of a party having created a litigation in which he has failed ; and that consequently, the costs ought, as my learned friend on the Wool-sack has proposed, to be given to the respondent.

LORD WENSLEYDALE. — My Lords, I entirely agree in the result of the opinions of my three noble and learned friends who have preceded me. I think it is perfectly clear that the judgment of the Lords Justices ought to be affirmed, and I agree with the majority of your Lordships in thinking that it ought to be affirmed with costs, because the conclusion at which I have arrived is, that the

judgment is perfectly right, and open to no reasonable doubt. It is unnecessary for me to trouble you with many remarks, because all the remarks which I should have made have been much more clearly and ably expressed by my noble and learned friend opposite, and by the Lord Chancellor, who has so fully and distinctly stated the questions in the case.

There are three points to be considered. The first is,
* 668 * whether in this case the shares of the respondent were
duly forfeited? And that resolves itself into two questions,

whether there was any power of forfeiture in the company; and if there was, whether that power was duly exercised? I think the argument of Sir Richard Bethell so ingeniously and ably expressed, that there is inherent in every partnership of this kind, a right to reject a partner who refuses to contribute, cannot be maintained. If he refuses to contribute, the remedy is open. If his obligation to contribute is expressed in a covenant, it is by an action upon the covenant. If it is expressed in a written engagement, there may be an action upon the deed; and if it does not come within either of those cases, recourse must be had to a Court of equity. In this case the power of forfeiture depends entirely upon this, whether the partners had agreed that the shares should be forfeited in the event which has occurred. That depends upon the terms of the written agreement, which is not an executory agreement, to be reduced afterwards to a regular agreement, but one which contains all the terms agreed upon between the parties. And unless it is proved affirmatively that it is the custom of Cornwall or Devonshire to have a forfeiture declared whenever the parties refuse to pay their contributions, it is not made out on the part of the appellants. It appears to me to be perfectly clear upon the balance of the evidence, that it is not proved that there is any such custom in Cornwall or Devonshire; and if there had been such a custom, it is equally clear upon the evidence that that was never acted upon in this case, because the shares were not duly declared to be forfeited according to that custom.

Then the next question is, whether the respondent is estopped by his own declarations (and this is a point which as my noble and learned friend who spoke last observed, is not contained in
* 669 the answer), whether the expressions * which he used are
to be considered as estopping the respondent from his right to question the fact. Now the doctrine of estoppel has been fully

explained in the last case of *Freeman v. Cooke*; and even if the words which are attributed to the respondent were proved to have been used, then I take it to be clear that they do not amount to an estoppel within the meaning of that term. According to the evidence, the two witnesses on one side are contradicted by two witnesses on the other. So that the words cannot be considered as being proved to have been used, but if they had been, I think the expression does not amount to what is necessary to constitute an estoppel in this case. Therefore, upon the ground of forfeiture, I consider that the case on the part of the appellants entirely fails.

Then the next question is, whether in the case of there not being a forfeiture, or the forfeiture not being duly declared, that which has been done here can operate as a dissolution of partnership, so as to entitle the other partners to put an end to it and wind it up altogether. It appears to me that what was done cannot be considered as amounting to that regular notice of dissolution of partnership which it is competent to partners to give to one another, this being a partnership for an indefinite time. I think that what was done was with a different intention, and that the partner whose shares were alleged to have been forfeited cannot be considered as being in the same situation in which he would have been if he had received a regular notice of steps being taken to have the partnership dissolved. If such regular notice had been given, he would have been bound immediately to acquiesce in it, and the accounts might have been taken, and the true value of his shares might have been ascertained. But he being told, not that the partnership is to be dissolved, but that his shares are forfeited, is placed in a different situation. He is not * bound to take any no- * 670 tice of that. If there had been a notice of dissolution, the argument which has been suggested by my noble and learned friend who last addressed your Lordships, seems to me perfectly conclusive, namely, that the other two partners had no right to go on afterwards with the capital of a partner to whom notice of dissolution had been given, and to trade with that capital; and if they do so they must be bound to account to him, unless he has in some way or other waived his right.

That brings me to the third question in this case, which is the most important and the most difficult; that is, whether or not the respondent is estopped by his conduct from complaining of this forfeiture. That depends entirely upon the rule which has been es-

tablished in the Courts of Equity with respect to persons so situated. Now it appears to me that the principle to be deduced from the cases of *Prendergast v. Turton* and *Norway v. Rowe*, is, that if a party lies by, and by his conduct intimates to the other partners in the concern that he has abandoned his share, they may then deal with it as they please; if his conduct amounts to a representation of that sort, he is estopped by it and cannot afterwards complain. Then the question is, whether upon the facts stated in this case the respondent is in that situation. It seems to me that this case differs very materially from those cases of *Norway v. Rowe* and *Prendergast v. Turton*. In that case the interpretation put upon the conduct of the parties, which was very different from the conduct of the party in this case, was, that they had laid by and pursued a course which was tantamount to saying, You may go on with the concern at your own risk and for your own benefit; I will have nothing more to do with it. If the conduct of the party has amounted to that, it is no doubt a perfectly just principle that he shall be held estopped, and not afterwards be entitled to

* 671 claim a * share of the profit made by those persons to whom he has made that representation. Now, looking at the conduct of the respondent in this case, it appears to me perfectly clear that it cannot be considered as amounting to an acquiescence of that sort. From the very first he disputed the right of the appellants to declare the forfeiture of his shares; he has been complaining of them from that day to this, and it is impossible to regard his conduct as amounting to an implied agreement, or an implied representation that they might go on with the concern for their own benefit, and that he would not claim any share of the profits. I think, therefore, that that part of the case of the appellants entirely fails. And upon the whole I think that in this case the judgment of the Court below was perfectly right. And being of that opinion, upon a full consideration of the case which has been fully argued before your Lordships, I concur in the opinion, not merely that the decree of the Lords Justices should be affirmed, but that the usual consequence ought to follow, that it should be affirmed with costs.

Decree appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 23d March, 1858.

* CROFT v. LUMLEY.

* 672

1857. June 29, 30. 1858. February 15; April 17.

FAITHFUL CROFT, *Plaintiff in error.*BENJAMIN LUMLEY, *Defendant in error.*¹

Ejectment. Covenants. Affirmative and Negative. Forfeiture. Waiver.

A lease of the Opera House contained covenants on the part of the lessee: —

First: not to use the house for any but purposes of a theatrical kind, and “to use his best endeavours to improve” the house for that purpose. The house was closed at the end of the season of 1852, and was not opened at all during the following year: —

Held, that this was not a breach of the covenant.

Second: not to grant away, assign, dispose of, &c. the stalls or boxes “for any longer period than one year or season.” On the 21st December, 1851, the lessee leased certain boxes for one year, to commence from March, 1852. On the 1st August, 1852, he made another lease of the same boxes to a different person, with this *habendum*, “from the first February now next ensuing, or from such subsequent day during the year, upon which the theatre shall be opened, and thenceforth for the full term of one year, to be computed from that day”: —

Held, that this was not a breach of the covenant.

Third: “not to charge nor encumber the theatre, or the income thereof, or the terms hereby granted by mortgaging the same, or granting any rent charges or any other encumbrance whatever.” The lessee was greatly in debt. In respect of his debts he granted warrants of attorney (one of which was to secure payment of bills not then due, and another provided that it was a concurrent security, with an indenture therein recited, that judgment was to be entered up when the grantee thought fit, and be registered), and judgments were signed against him on those warrants of attorney, and upon Judge’s orders, and registered: —

Held, that no breach of this covenant had been committed.

A lessee tenders money in payment of rent due, and requires that it shall be accepted as rent; the lessor refuses so to accept it, but says that he will accept it as compensation for past occupation, and (each party still continuing to assert what is his own intention on the matter) takes up the money: *Quære*, whether this amounts to a waiver of a previous right of re-entry on a forfeiture for breach of covenant? And *Quære*, whether a waiver will operate upon breaches not known at the time?

* *Semble*, that where a clause of re-entry is “if the lessee shall make default of or in the performance of all or any of the other covenants,” &c. a non-observance of negative covenants will entitle the lessor to re-enter.

¹ *Jeffries v. Alexander*, 8 H. L. Cas. 607.

THIS was a writ of error on a judgment of the Exchequer Chamber, which had affirmed a previous judgment of the Court of Queen's Bench.

In 1845 the plaintiff demised to Benjamin Lumley, the Opera House in the Haymarket, as to one part for sixty-six, and as to another part for fifty-one years, at an annual rent of 1934*l.* 14*s.* The lease contained several covenants, some of which the plaintiff alleged to have been broken, and thereon brought ejectment against Lumley, to recover possession of the house. The cause was tried at the Middlesex Sitings after Hilary Term, 1855, when a verdict was taken by consent for the plaintiff, subject to the opinion of the Court on a case. The case stated several parts of the lease, and set forth the following covenants: First, that Lumley covenanted with Croft that he, "Lumley, his executors, administrators and assigns shall not, nor will at any time hereafter, during the said term, convert the said theatre or opera house, or any part thereof, to any other use than for acting or performing operas, plays, concerts, balls, masquerades, assemblies, and such theatrical and other public diversions and entertainments as have been usually given therein, but shall and will, during all the said term, use his and their utmost endeavours to improve the same for that use and purpose." The breach complained of was that the Opera House was not opened after the season of 1852.

The second covenant on which a question arose, was that "Lumley, his executors, &c., shall not nor will, without the consent in writing of Croft, grant away, assign or let, charge or dispose of, the boxes or stalls of the said theatre, or any of them, respectively (except ninety-six specially * mentioned) for any term or number of years whatsoever, or for any longer period than one year or season." The breach complained of was the execution of leases of certain boxes and stalls (not of the excepted number), for what were alleged to be terms exceeding one year or season: one instance was this: — On the 20th December, 1851, the defendant leased to one Brandus certain boxes for one year from the 1st March, 1852, and on the 1st August, 1852, he made another lease of the same boxes to one Hughes, the *habendum* of which was to hold these boxes "from the 1st day of February now next ensuing, or from such subsequent day during the year 1853, upon which the said theatre or opera house shall be first opened for the public performance of operas or other thea-

trical entertainments, and thenceforth for the full term of one year, to be computed from that day ; provided, nevertheless, that in case the said theatre or opera house should not during the said year, 1853, be opened for the public performance of operas or other theatrical entertainments, then, in substitution for, and not in addition to, the said term, the term hereby granted should commence on the first day in any ensuing year on which day the said theatre or opera house should be first opened for the public performance of operas or other theatrical performances, and the same term should thenceforth continue for the term of one year, computed from that day, subject nevertheless to a proviso for redemption."

A third covenant was, that Lumley would not "charge nor encumber the said theatre, or the income thereof, or the terms hereby granted, by mortgaging the same, or granting any rent charges, or any other encumbrance or encumbrances whatsoever." The breach alleged was, that Lumley had given warrants of attorney to Mr. Hughes and other persons, to secure the payment of different sums of money. One was a warrant of attorney granted in * June, 1852, to secure the payment of certain bills of ex- * 675 change, the earliest of which appeared to be payable on the "30th of July next," and the latest on the "1st of October next." Judgment was signed on this warrant of attorney on the 10th of August, 1852, and was duly registered in the Common Pleas Office and the Middlesex Registry Office. Another was a warrant of attorney dated 6th of October, 1852, the defeasance of which was relied on. It recited an indenture of the 1st August of that year, whereby, to secure payment of a sum of 2500*l.*, it was agreed that the warrant of attorney should be given, and that the judgment to be entered up by virtue thereof was intended as a concurrent security with the indenture, and that "judgment shall forthwith, or at such time hereafter as Hughes shall think fit, be entered up under the authority of the said warrant of attorney, and be registered ; but that no execution shall be issued upon the said judgment unless or until the said sum " (a portion of the gross amount) "shall not be paid on the 1st day of February now next ensuing ; but in case such default shall be made, it shall be lawful for Hughes, his executors, &c., immediately, or at any time, to issue execution upon the said judgment against Lumley for the said sum, &c., together with costs, &c., without making or enter-

ing into any previous suggestion, and without suing out any writ of *scire facias*, &c." Judgment was signed on this warrant of attorney upon the 20th October, 1852, and it was registered both in the Common Pleas Office and the Middlesex Registry Office. Other warrants of attorney had been given, and there were besides several Judges' orders for payment of money, which orders were made in causes wherein Lumley was the defendant, and other persons, his creditors, were plaintiffs. The case found that Hughes was not aware, until about August, 1852, that Lumley was * 676 the lessee of the Opera * House. The lease to the defendant contained a proviso for re-entry for breach of the covenants to pay the rent; not to let boxes, &c. for more than one year; to insure the property; to pay the premiums on the insurance; or "if Lumley shall make default of or in the performance of all or any of the other covenants hereinbefore contained, which on his part are or ought to be performed, observed, and kept."

The case further stated that Mr. Martelli, the agent for the plaintiff and for the parties beneficially interested under the lease, became acquainted, in July, 1854, with the existence and registration of some, but not all, of these judgments, and shortly afterwards with the mode in which leases of boxes and stalls had been granted. The rent reserved was duly paid up to and including Lady Day, 1854. When the next quarter's rent became due, a correspondence ensued between Messrs. Lyon, Barnes, and Ellis, acting on behalf of Lumley and the boxholders, and Mr. Martelli, acting on behalf of Mr. Croft and others. In the first letter, dated 26th July, 1854, Messrs. Lyon proposed to pay "the rent on your handing to us a receipt in the usual form." Mr. Martelli answered, on the 27th July, that "any receipt which could now be given in respect of any payment on account of the occupation of her Majesty's Theatre, must express that it is given without prejudice to the lessor's right of re-entry. I am prepared, however, to accept, on the part of the lessor, the amount payable for the last quarter, without giving any receipt, on the express understanding that such amount shall be received as compensation for the occupation merely, and not as rent under an existing and unforfeited lease, and on the express understanding that such receipt shall not be construed as any waiver of the lessor's right of re-entry." Messrs. Lyon and Company, on the same day, replied: "We understand from your letter that you decline to give the usual,

* that is, the unqualified receipt for the quarter's rent due * 677 at Midsummer. We decline to pay it to you upon any qualified receipt, or on any understanding, but we will pay it to the lessor without requiring from him any receipt at all, and he may accept it or reject it as he may be advised."

On the 28th July Mr. Martelli wrote: "I am sorry I have not explained myself with sufficient clearness; but it is not, I think, from misunderstanding your letter. You offer to pay the amount in question, either on my unqualified receipt or to the lessor without any receipt. I, as the agent of the lessor, say I cannot give you an unqualified receipt, but am willing to accept the amount without any receipt being given; but stating to you that I accept it without prejudice in the manner described in my last letter. I shall be satisfied by thus clearly intimating that I do not by such acceptance waive the lessor's right of re-entry, whether you acquiesce in my intimation or not. I do not ask you to pay the amount on the footing that you accede to any understanding, I merely wish to express the lessor's view and intention. If you think fit to send me a crossed cheque for the amount after what has passed, I shall have no objection to receive it, without writing or saying anything more. It is for you to determine whether you will send the cheque under such circumstances. The lessor will not reject it. I do not understand that you wish to distinguish between the lessor and his agent, so as to be desirous, under these circumstances, to pay to him instead of me; but this again is for you to decide."

Messrs. Lyon, on the 29th July, answered: "Upon reconsideration of the matter, it appears to us that we had better let the matter remain as it stands, until you are willing to give us the usual receipt for the rent now due, and therefore we do not propose to tender the rent to the lessor."

There was then a cessation of the correspondence. After * the next quarter had become due, Messrs. Lyon and Com- * 678 pany on the 6th October, 1854, wrote to say, "It would be a convenience to us to know whether it is your intention to apply for payment of the rent of her Majesty's Theatre, due on the 29th ultimo, and to give the usual receipt for it, in order that we may provide for the payment"; to which Mr. Martelli answered, "I shall be very glad to receive both the Midsummer and Michaelmas rent for her Majesty's Theatre, but I can only do so without preju-

dice to the right to bring ejectment, and any receipt to be given must be expressed accordingly."

On the 26th October, 1854, it was arranged that Mr. Martelli, as the authorised agent of the plaintiff, should call on the following day on Mr. Barnes, of the firm of Lyon, Barnes, and Ellis. Mr. Martelli accordingly called and saw Mr. Barnes. Before going to Mr. Barnes, Mr. Martelli wrote a letter, of which the following is a copy, and took the same with him to Mr. Barnes's office: "To avoid any misunderstanding on my receiving the money which you inform me you intend to pay on account of rent for her Majesty's Theatre, I beg to say that I adhere to the resolutions on the subject expressed in my letters to you of the 27th and 28th July last, and the 7th October instant, and that I intend to receive as compensation for the occupation merely, and not as rent, under an existing and unforfeited lease, any amount that you may pay, not waiving the lessor's right of re-entry, but expressly reserving the same."

At this interview Mr. Martelli produced this letter and read it, and endeavoured to get Mr. Barnes to attend to it, but Mr. Barnes declined to hear or attend to the letter.

After some conversation, a sum of money equal to the amount of the Midsummer and Michaelmas rent was produced, *679 and Mr. Barnes, on behalf of the defendant, *tendered the amount to Mr. Martelli, stating "that he tendered to him the half year's rent due at Michaelmas, and that he did so without any condition or reservation." Mr. Martelli stated, "that he would not receive the money as rent due under an existing unforfeited lease, but that he was willing to accept it as compensation for the occupation merely, and without prejudice to the lessor's right of re-entry for breach of covenant." Mr. Barnes thereupon said, "that he assented to no such condition, that he tendered the money unconditionally as rent due, and that as rent Mr. Martelli must take it or leave it." Mr. Martelli said, "that he understood what Mr. Barnes meant." After some further conversation, in which Mr. Martelli and Mr. Barnes respectively adhered to their intention previously expressed, Mr. Martelli took up the money saying, at the time of so taking it, "that he took it as compensation for the occupation of the premises merely, and not as rent due under an existing and unforfeited lease, and that he did not waive the lessor's right of re-entry, but expressly reserved it."

Upon the above-mentioned occasion, no receipt was asked for or given.

The questions for the opinion of the Court were, whether the lease had been under the circumstances of this case forfeited? and if so, whether there had been a waiver of the forfeiture? The case was argued in the Court of Queen's Bench in Michaelmas Term, 1855, and Lord Campbell delivered the judgment of the Court to the effect that there had not been any breach of the covenants to improve the theatre, and not to let the boxes for more than one year or season, but that by the warrant of attorney of the 6th October, 1852, there had been a breach of the covenant not to encumber the theatre. But the Court was also of opinion that by the acceptance of rent there had been a * waiver of * 680 the forfeiture. Judgment was, therefore, entered for the defendant.¹ The plaintiff brought error in the Exchequer Chamber, where the case was argued in Hilary Vacation, 1856, and the judgment of the Court below affirmed, the Judges in the Exchequer Chamber being of opinion that on no one of the covenants had any forfeiture been incurred.² Error was then brought to this House.

The Judges were summoned; and Mr. Justice Coleridge, Mr. Justice Wightman, Mr. Justice Erle, Mr. Justice Williams, Mr. Baron Martin, Mr. Justice Crompton, Mr. Baron Bramwell, Mr. Baron Watson, and Mr. Baron Channell attended.

1857. June 29.

The Attorney-General (Sir R. Bethell) and Mr. H. Hill (Mr. Unthank was with them) for the plaintiff in error. — The lease of the house was, during some of the transactions between Lumley and Hughes shown to the latter, and that fact fairly gave rise to the inference that these transactions were entered into with reference to that lease, and to the security which it would afford to creditors.

The covenant as to improving the theatre for the “aforesaid use and purpose,” was violated not merely by shutting it up, but by the letting of the boxes in the manner practised here; for the intended improvement involved the continued application of the house to the use and purpose of a theatre, and that was rendered impossible by Lumley letting out boxes for long periods at a rate

¹ 5 Ellis & B. 648.

² 5 Ellis & B. 682.

and under circumstances which disabled him from making the most of them for the purpose of increasing the funds with which he was to keep the theatre open. The real meaning of the covenant was, that Lumley would deal with the property so as to * 681 make it more attractive. Not to keep open a * theatre, like not keeping open an hotel, is to ruin it; the public go elsewhere. If it should be said that the covenant is only one that, *sub modo*, he will use his best endeavours to keep the theatre open, the answer is, that the doing of that which will prevent such endeavours, or will render them useless, is a breach of even such a limited covenant. *Simpson v. Clayton*.¹ There a lessee of the Crown made an underlease, and covenanted that he would use his "utmost endeavours" to obtain a renewal; the Crown demanded a larger fine than before, and he would not pay it. So no renewal was granted. That was held to be a breach of his covenant. *Linder v. Pryor*² is to the same effect, the default in each of these cases being held to be the necessary result of the covenantor's own act. [THE LORD CHANCELLOR. — Was it found in *Simpson v. Clayton* that the fine demanded was reasonable; for, if not, would it be a breach of covenant that he refused to pay an unreasonable sum?] That does not affect the principle. The covenant amounts to a kind of equitable assurance. Having entered into it he is bound to fulfil it.

Then as to the covenant not to charge or encumber the property. By the modern practice of conveyancing a registered judgment is treated (even independently of the statute) as a charge or encumbrance on leasehold property, and conveyancers on the sale of a leasehold require that the vendor shall enter up satisfaction on such a judgment before the sale is completed. The Statute 1 & 2 Vict. c. 110, makes it a charge, and extends to all interests which the debtor could charge. *Watts v. Porter*.³ If a lease becomes subject to a charge by the operation of law consequent on an act of the party, it cannot be said that the party who did the act which occasioned the consequence has not created the charge on * 682 the lease. The cases already quoted * as to the first covenant apply here; the covenantor must be taken to have known what would be the consequences of his own act, and to have done the act with that knowledge. This argument is strengthened

¹ 4 Bing. N. C. 758, 6 Scott, 469.

² 3 Ellis & B. 743.

³ 8 Car. & P. 518.

by the words of the warrant of attorney, which authorise the grantee of the warrant of attorney forthwith to "enter up judgment if he shall so think fit." The 13th section of the 1 & 2 Vict. c. 110, makes the judgment creditor an encumbrancer. In *Ex parte Boyle*,¹ it was held that a registered judgment, although entered up on a warrant of attorney, and although not followed by execution, constitutes a valid lien on lands. A charge on the lease was, therefore, held to be created by such a judgment. That case directly applies to the present, and the defendant must be treated as himself creating the encumbrance. And such are the rights acquired by a judgment creditor under these circumstances, that in *Johnson v. Holdsworth*² it was held that a judgment creditor, whose judgment was fully registered under this statute and the West Riding Act, was entitled to file a bill to redeem a prior mortgagee. And in *Hawkins v. Gathercole*,³ it was stated in the judgment, that the statute said in effect that a registered judgment shall be equivalent to a contract or grant of a charge on the property made by a person legally capable of making it. The creditor would then be a mortgagee or encumbrancer, and to do that which gives him that character is to do or suffer the charging and encumbering of the property. That brings the case within the very words of the covenant. The Judges of the Court of Queen's Bench held that this was a charge. The Judges in the Exchequer Chamber thought that it was not, because the warrants of attorney were given to *bond fide* creditors, and were given on compulsion; but an examination of this reasoning shows, that even admitting their principle of * distinction, which is not admitted in this * 683 case, they took no notice of the fact that all these judgments were not given for past debts, but some were intended to cover future liabilities. That fact makes the case of *Doe d. Mitchinson v. Carter*,⁴ which was relied on by the Court of Exchequer Chamber, a strong authority for the plaintiff; for, on the second of the occasions when that case was before the Court, a warrant of attorney given to a creditor to enable him to enter up judgment, and take a lease in execution, was held to be an act done in fraud of the covenant "not to let, assign, transfer, or make over," even though it appeared that it was given in respect of a past debt. Here, as there, the charge was voluntarily created, and was

¹ 3 De G., M. & G. 515.

² 1 Sim. N. S. 63, 74.

³ 1 Sim. N. S. 106.

⁴ 8 T. R. 57, 300.

therefore treated as created with a full knowledge of the consequences.

Then, as to the breach of the covenant not to lease boxes or stalls for more than a year or season. When the lease had been granted to Brandus, the defendant had no power to deal with the property thus leased till the expiration of that lease. Yet he affected to grant a lease of the same property to other persons, to commence before the lease to Brandus expired ; and that was, in fact, an attempt to grant a demise in reversion, and was in excess of his power ; *Sugden on Powers*,¹ where it is said : " It has been determined that even a general power to lease for a certain number of years, without expressing that the leases shall be in possession, and not in reversion, authorises leases in possession only, and not in reversion, or *in futuro* : for if by the power a reversionary lease might be made, then a lease for the years authorised might be made in possession, and afterwards infinite leases for the same term in reversion, which would be contrary to the * 684 meaning * of the power, and would render idle and vain the express limitation in the power of the number of years for which the lease might be granted." *Lady Sussex v. Wroth* is relied on for this doctrine. Here, by the conjoint operation of the two leases, Lumley parted with boxes for a period exceeding one year.

As to the waiver, the Court of Queen's Bench acted on an ordinary and well-known principle of law. But that principle only applies where nothing has been said by the receiver, in contradiction to the terms stated by the payer of the money. There is no rule which says that the will of the payer shall have full effect against the will of the receiver. The intention is a *presumptio juris*, but no more ; and that presumption cannot have place against undoubted facts. The example of this is *Green's Case*,² where it is said he cannot re-enter " if he make acquittance for the rent, as a rent ; contrary, if the acquittance be but for a sum of money, and not expressly for the rent ; all which *tota curia concessit*." ³ But in that case there was no continued and clearly expressed conflict of intention ; where such a conflict does exist no presumption of law can arise.

¹ 7th ed. vol. 2, p. 345, 8th ed. p. 749.

² See post, p. 687, n.

³ Cro. Eliz. 3, 1 Leon. 262.

Sir F. Thesiger and *Sir F. Kelly* for the defendant in error. — As to the first alleged breach, the mere circumstance of closing the theatre does not show that the defendant did not use his best endeavours to “improve the house.” The covenant has no relation to an act of that kind, but applies only to improvements in the house itself, and was never meant to bind the defendant to keep it open to his own ruin.

[Their Lordships intimated that the learned counsel need not be troubled upon this point.]

* Then, as to the leasing stalls and boxes, the words of * 685 the covenant are plain and have been fully complied with.

There is no covenant in the lease against letting stalls or boxes on leases to commence at a future time; the only covenant of the sort is that which prohibits the defendant from letting for more than a year. There has not been any lease granted by him for a longer period. The passage cited from Sugden on Powers,¹ does not therefore apply in fact, nor does it apply in principle; for here the lease was not made under a power, but in virtue of the general right of a lessee, that right being only restricted in one particular, and that particular restriction having been exactly observed. In *Fox v. Collier*,² and *Read v. Nashe*,³ such a lease was held good, because the inheritance was not charged in the whole with more than the specified amount of time; and it is a rule of law that covenants to work a forfeiture shall not be favoured by construction: Co. Lit.,⁴ Blackstone,⁵ Sheppard's Touchstone.⁶

As to the encumbering the theatre. The granting of a warrant of attorney to a *bond fide* creditor is not creating a charge on the property within the meaning of the 1 & 2 Vict. c. 110, § 13. The statute itself shows the distinction between involuntary judgments, which these are, and such as are created by the voluntary act of the parties intending to encumber. The provisions of the 2 & 3 Vict. c. 37, § 1, justify this construction of the earlier statute. Both statutes were fully considered in *Lane v. Horlock*,⁷ where the opinions of Mr. Justice Wightman,⁸ and of Vice-Chancellor Kindersley,⁹ in previous stages of the same case, were reviewed.

¹ 7th ed. vol. 2, p. 345, 8th ed. p. 749.

² 1 And. 65, pl. 140.

³ 1 Leon. 147.

⁴ 42 a, 183 a.

⁵ 2 Com. 379.

⁶ Ch. 5, p. 88.

⁷ 5 H. L. Cas. 580.

⁸ 4 Dowl. & L. 408.

⁹ 1 Drewry, 587.

* 686 Lord Brougham there said : ¹ " It does not * at all follow, because a judgment, the fruit of the warrant, the judgment to which the fictitious action upon the warrant has led, would be a real security both in equity and law, that therefore the warrant itself was a real security." A similar principle has been adopted in those cases under the 13 Eliz. c. 10, with respect to creating a charge upon a benefice : *Colebrook v. Layton*,² *Hawkins v. Gathercole*,³ and *Flight v. Salter*.⁴ The distinction between involuntary judgments, and judgments purposely entered up with a view to create a charge, is very clearly taken in *Doe d. Mitchinson v. Carter*.⁵ There a covenant existed not to " let, assign, transfer, make over, barter, exchange or otherwise part with the indenture " ; the covenantor gave a warrant of attorney, on which a judgment was entered up, and the lease taken in execution and sold. The Court held, as matter of law, that this was no forfeiture of the lease. Another ejectment was, however, afterwards brought ; and then, the evidence showing that the grant of the warrant of attorney had been voluntary, and was made for the purpose of evading the provisions of the covenant, the Court⁶ gave judgment for the lessor ; but there fraud was expressly found. These two decisions established the same point of law, namely, that where there was a warrant of attorney granted *bond fide* to a creditor, it was not a breach of the covenant not to assign. It was the fraud alone which led to the second judgment. There was no fraud here ; and, besides that, Hughes did not know at the time that Lumley was lessee of the Opera House, and Lumley (as the case finds) had other property in Middlesex on which the judgment would attach.

These circumstances are sufficient to take this case out of * 687 the operation * of the decision on the second case of *Doe d.*

Mitchinson v. Carter, and to bring it within the first. The doctrine in *Ex parte Boyle*⁷ is admitted, but it does not affect this case. The words of the covenant here prohibit a direct act of charging, and the grant of a warrant of attorney to a *bond fide* creditor is not an act of that sort.

Again : the proviso for re-entry is made to apply to specific covenants, all of which are affirmative. This is not one of them,

¹ 5 H. L. Cas. 603.

² 4 B. & Ad. 578.

³ 1 Sim. N. S. 63.

⁴ 1 B. & Ad. 673.

⁵ 8 T. R. 57.

⁶ 8 T. R. 300.

⁷ 3 De G., M. & G. 515.

and consequently it cannot have effect here, but must be confined to those which are specially mentioned, the more particularly as this is a negative covenant: *Doe d. Palk v. Marchetti*,¹ and *Doe d. Abdy v. Stevens*,² where the omission to repair was held not to be an "act done" within the meaning of the proviso for re-entry for any act or thing done contrary to the covenants.

But supposing there had been any breach of covenant, there has been here a waiver. Not one of the cases cited touches a case like the present, where one person has insisted on paying money *quod* rent, and the other has received with a protest against taking it in that character.³

* *The Attorney-General* in reply. — *Doe d. Mitchinson v. Carter*⁴ only shows that a judgment on a warrant of attorney was not there treated as an "assignment," as specially mentioned in the lease; but when the case was decided with more reference to the facts than to the form of the covenant,⁵ it was held that a forfeiture had been committed. *Lane v. Horlock*⁶ depended on the construction to be given to the statutes on usury. Vice-Chancellor Kindersley's opinion was there quoted by the Lord Chancellor, who said:⁷ "His Honour considered that inasmuch as by the express terms of the 1 & 2 Vict. c. 110, § 13, it is enacted that a judgment creditor is to have the same remedies as if his debtor had agreed in writing to charge his lands, it was difficult to say that in a case where real estate was intended to be charged, the proviso in the statute could be avoided by obtaining the charge, not directly by a writing signed

¹ 1 B. & Ad. 715.

² 3 B. & Ad. 299.

³ As the House abstained from giving any judgment upon this point, it has not been deemed proper to go more fully into this part of the argument, either on the part of the plaintiff or the defendant in error, than merely to indicate the manner in which this question was treated. The following cases were quoted: *Green's Case*, Cro. Eliz. 3, 1 Leon. 262. *Doe d. Cheny v. Batten*, Cowp. 248. *Doe d. Morecraft v. Meux*, 1 Car. & P. 346. *Jones v. Carter*, 15 M. & W. 718. *Bailey v. Mason*, 2 Irish Law, N. S. 582. *Doe d. Nash v. Birch*, 1 M. & W. 402. *Doe d. Griffith v. Pritchard*, 5 B. & Ad. 765. *Vin. Abr. Payment. Pinnel's Case*, 5 Rep. 117. *Anonymous*, Cro. Eliz. 68. *Dumpor's Case*, 2 Smith's Lead. Cas., 28. *Bois v. Cranfield*, Styles, 239. *Hardman v. Bellhouse*, 9 M. & W. 596. *Webb v. Weatherby*, 1 Bing. N. C. 502. *Doe d. Mu-ton v. Gladwin*, 6 Q. B. 953. 1 Wms. Sand. n. to *Duppa v. Mayo*, 287 d.

⁴ 8 T. R. 57.

⁵ 5 H. L. Cas. 580.

⁶ 8 T. R. 300.

⁷ 5 H. L. Cas. 595.

by the debtor, but by a judgment to which the statute gives the effect of such a writing. It is impossible not to feel the force of this reasoning." And again,¹ "I am rather inclined to concur with the Vice-Chancellor in thinking, that a judgment so given is a security on land within the true intent and meaning of the proviso"; and the effect of the decision in that case is described by his Lordship when he says: "In the view which I take of the subject, the question does not turn on the Statute of Victoria, but on the previous statute, 3 & 4 Wm. 4. c. 98, § 7." The cases relating to benefices in which it was considered that they were not charges within the Statute of Elizabeth, were decided on the ground

* 689 that the objects of the charge did not appear on the * face of the warrants of attorney. The covenant of re-entry applies not only to affirmative covenants which are to be performed, but to negative covenants also; for it includes those which are "to be performed and kept," that is, to be observed and obeyed. The covenant not to grant encumbrances comes within that description. *Doe d. Palk v. Marchetti*² cannot be sustained, but *Doe d. Antrobus v. Jepson*³ is precisely applicable. There the lessee covenanted among other things to consume the hay on the premises under a penalty of 5*l.* for every ton carried off. There was then a general proviso for re-entry for breach of "any of the covenants" in the lease. The lessee did carry off hay, and the general proviso was held sufficient to give the lessor the right to re-enter, even in addition to the penalty.

The prohibition to lease for more than a year was a protection to the tenant, while it was a security to the landlord, for it was intended to prevent any part of the theatre getting out of Lumley's control for more than a year, and so disabling him from using the theatre and improving the property. That is a covenant which must therefore be strictly construed. As to waiver,⁴ a forfeiture is a fact; the right to enter on it is a legal consequence; they cannot be set aside by the mere declaration of the tenant that he pays money (which at all events he must pay) with the intention of neutralizing both. If it is not so received — and the intention of the lessor must be at least as operative as that of the lessee — if that mode of paying it is denied and refused, as it was here, no such effect can follow.

¹ 5 H. L. Cas. 596.

² 3 B. & Ad. 402.

³ 1 B. & Ad. 715.

⁴ See ante, p. 687, n.

THE LORD CHANCELLOR proposed the following questions to the Judges : —

*1. Whether the special case discloses a breach of the *690 covenant not to grant, let, or otherwise dispose of any of the boxes or stalls of the theatre for any longer period than one year or one season ?

2. Whether the special case discloses a breach of the covenant not to charge or encumber the theatre or any part thereof ?

3. Whether, by reason of such breaches (if any) or either of them, the plaintiff in error acquired a right of re-entry on the theatre, or any part thereof ?

4. Whether such right of re-entry (if any) was waived by the plaintiff in error ?

1858. February 15.

MR. BARON CHANNELL. — My Lords, the unanimous judgment of the Court of Queen's Bench in this case is at variance with the unanimous judgment of the Court of Exchequer Chamber. After an able argument at your Lordships' bar, difference of opinion still prevails amongst the Judges who heard that argument.

My opinion, in answer to your Lordships' first question, given with great distrust as to its correctness, is, that the special case does not disclose a breach of the covenant contained in the lease of the 10th July, 1845, that the lessee shall not "grant away, assign or let, change, or dispose of any box for any term, or number of years whatsoever, or for any longer period than one year or season." The facts applicable to this covenant are [his Lordship stated them.]

I do not feel at all pressed with the argument that the lease to Hughes considered apart from the lease to Brandus was a lease to commence *in futuro*. The term for which the lease was granted, whenever that term was to commence, was one which in point of its duration was not *.prohib- *691 ited by the covenant. I quite concur in the opinion of the Court of Queen's Bench that a lease of a box for a term to commence *in futuro* is not of itself a breach of the covenant. Had the lease to Hughes been executed on the 14th of August, it would have been, I conceive, free from all objection. Cases with respect to powers do not seem to me very distinctly to apply. As observed in the judgment of the Court of Queen's Bench, this is the case of a covenant in restraint of a power of leasing which

Lumley had from the estate vested in him. But by the conjoint operation of the lease to Brandus and the lease to Hughes, Lumley divested himself, in other words parted with certain boxes for a period exceeding one year or one season. It is this view of the case which gives rise in my mind to some difficulty. This view was strongly relied on in the argument at your Lordships' bar. It was not, so far as I understand, prominently submitted to the Court of Queen's Bench, and is not therefore distinctly dealt with in the judgment of that Court.

With a view to consider whether what at first sight may appear to have been the meaning of the covenant was really and truly the meaning of the parties to it, I may take into consideration the nature of the property ; certainly, all the terms of the lease in which the covenant is contained. Having done so, and by this help construed the covenant, I think the facts do not disclose a breach. The lease was a lease of a theatre or opera house. It contemplated that the demised premises should be used for theatrical entertainments, and such like entertainments only. It required that the lessee should not only so use the premises, but use his best endeavours to improve the same for that use and purpose. To this end, I think, that the lease contemplated that the annual or season income should be applied to the annual or season expenses, * 692 and by these * means that the opera might be kept open, and the value of the premises (supposed to depend on their use for operatic entertainments) preserved. It was not, I think, intended by the covenant to prevent several separate and distinct lettings, at different times, of one box, each letting being for a term not exceeding one year or season, though the several terms combined might exceed the period of a year, where such lettings might conduce to the improvement and value of the premises to be used as an opera, and where there was nothing to prevent the rent or income under such letting being applied to the current expenses of that year.

I proceed then to consider your Lordships' second question. The mere grant of a warrant of attorney to secure a just debt, or the consent to a Judge's order to sign judgment in a *bonâ fide* action to which there is no defence, would be no breach of this covenant, though it might lead eventually to the lease being taken in execution. Such is the language of the Court of Queen's Bench ; I humbly concur in that portion of its judgment. If the

case had found, or there had been facts which in my opinion ought to induce your Lordships to infer, that Lumley (who had power to assign) gave the warrant of attorney with the intent and design to charge the theatre, I should agree in thinking there would have been a breach of the covenant. Apart from the statute, I think Lumley did not charge the premises. Did his acts, interpreted by the statute, amount to a charge? I think not. If Lumley charged the theatre by warrant of attorney, it was by the warrant of attorney to Mr. Hughes, dated the 6th day of October, 1852. That is the strongest case for the plaintiff in error. If he did not by that warrant of attorney, he did not by any other. By that warrant of attorney Mr. Lumley gave power to Mr. Hughes to charge or encumber the lands but he himself did not charge or encumber them. If * matters had stopped * 693 where Lumley's interference ended, there would, I think, have been no actual charge or encumbrance. It is no doubt stated in the defeasance that Mr. Hughes was to be at liberty to register the judgment. That power he would have had without any mention of it in the defeasance. The statute was intended to give creditors claiming under acts such as those of Mr. Lumley a better remedy; but it has not, I think, the effect of making that a grant by the defendant of a charge or encumbrance, when, before the act, it could not be said that the defendant had granted the charge or encumbrance. I answer your Lordships' second question by saying, that the special case does not disclose a breach of the covenant not to charge or encumber the theatre, or any part thereof.

But as this opinion may not receive your Lordships' sanction I proceed to consider your Lordships' third question, viz. whether by reason of the breaches, if any, in the first and second questions mentioned, or either of them, the plaintiff in error acquired a right of re-entry in the theatre; and for the purpose of answering this third question, I assume the existence of a breach of both covenants in the first and second questions mentioned. I am of opinion, then, that there was such a right of re-entry. I think that the condition ought to be construed with this amount of strictness, that it ought clearly to appear the condition was meant to include and did incorporate the covenant on the breach whereof the right to re-enter is claimed; but that the question whether the covenant itself is broken (having once ascertained that the condition for re-

entry applies to and includes it) is to be determined by reference to the rules which prevail in construing ordinary contracts between party and party. I think the condition gave to the lessor a * 694 right to re-enter, if the lessee did not * observe and keep his covenant not to grant or charge in the way and for a term prohibited by the lease.

Then, as fourthly inquired by your Lordships, was the right of re-entry, if any, waived by the plaintiff in error? I am of opinion it was not, as regards the breach, if any, of the covenant not to let or otherwise dispose of the boxes or stalls for a longer period than one year or season. I think there is no evidence to show that Martelli knew of the lease to Brandus. It is by the conjoint operation of that lease and the lease to Hughes that some boxes were, if at all, disposed of or parted with for more than a year contrary to the covenant. I think Martelli may be considered as the landlord, Brandus as the tenant; but that Martelli did not waive a forfeiture by reason of a breach of covenant of which he had no knowledge. I am of opinion upon the facts stated, that Martelli had no knowledge of the lease to Brandus. I think he had knowledge of the other supposed breaches of covenant (if any), and waived them.

The party paying the money had, in my judgment, a clear right to appropriate it. He distinctly paid the money as rent. He refused to pay it otherwise than as rent. Mr. Martelli refused in language to receive it as rent; but he did take it. What he did, not what he said, was in my humble opinion the all-important matter. He should have declined to take the money at all, if he meant to elect to proceed for a forfeiture. On this point I entirely concur with the judgment of the Court of Queen's Bench.

MR. BARON WATSON. — My Lords, in answer to the first question, I am of opinion that the special case does not disclose any breach of the covenant "not to grant, let, or otherwise dispose of * 695 * any of the boxes or stalls of the theatre for any longer period than one year or one season." The case states: [His Lordship read the statement and the evidence thereon.] It is a proper rule of construction, that the object and intent of this covenant must be looked at as well as the words used; and as the object of that covenant was, that these boxes should not be let for more than the season, with a view, no doubt, that the revenues of

the theatre should not be anticipated, and as these boxes were really not let for more than one season, I think that the case does not disclose any breach of covenant in this respect. In answer to the second question, I am of opinion that the special case does not disclose any breach of the covenant not to charge or encumber the theatre or any part thereof. The covenant in question is: [His Lordship read it.] In order to support this breach the case states that Lumley granted several warrants of attorney to several persons for debts due and owing from him, and more especially one to Hughes, in the defeasance to which, it was expressed to be a collateral security for a debt, and with a provision that the expense of registering the judgment should be borne by Lumley.

The nature and effect of a warrant of attorney are well known. Warrants of attorney are generally given where the party, having no defence to an action for debt, authorises an attorney to confess judgment in order to save expense. The warrant of attorney is no charge on the land. The judgment signed in pursuance of the warrant of attorney may affect a leasehold interest like this in two ways: first, by means of an execution, by which the lease might be taken and sold under a writ of *fiery facias*; and, secondly, by registering the judgment in the proper office, and when registered, the judgment would become an equitable charge under Statute 1 & 2 Vict. c. 110, § 13, and by registering a memorial thereof at the Middlesex * Registry the judgment would obtain * 696 priority over any charges or judgments subsequently registered at that registry.

I think that this covenant applies only to charges and encumbrances directly or immediately made by the lessee, as the covenant is not that the lessor shall not do any act whereby the lease should be sold or encumbered. It by no means follows that the person for whose benefit the warrant of attorney is given may ever enter up judgment thereon, or if judgment be entered up, that he may register the same so as to charge the lease. It could not be argued that contracting a debt which the defendant was unable to pay, although that might produce a judgment and a charge on the lease, could be a charging or encumbering within the meaning of the covenant. Such breach is to be without the will or consent of the lessor; and it could hardly be said that the consent to enter up judgment or register is a consent contemplated by the covenant. I think, therefore, the case as to this breach falls within the princi-

ple of *Doe d. Mitchinson v. Carter*,¹ and that no breach of that covenant has been occasioned by the facts stated in the special case.

In answer to the third question, I am of opinion that if there had been a breach of either of the covenants mentioned and referred to in the first and second questions proposed by your Lordships, the plaintiff in error acquired a right of re-entry on the theatre. For it appears to me that the proviso for re-entry would apply to and embrace negative as well as positive covenants.

In answer to the fourth question, I am of opinion that such right of re-entry (if any) was waived by the plaintiff in error. It appears by the special case that the plaintiff by his agent * 697 Martelli was aware of the lease to Hughes, * and of some of the judgments on the warrants of attorney at the time the money was received by Martelli, although not of all the judgments. This, I think, makes no difference, if he was aware of any one of the registered judgments. It is well established by authorities, ancient and modern, that receipt of rent accrued due after a breach of covenant known to the lessor at the time of such receipt of rent is a waiver of such forfeiture; for this reason, that the landlord affirms the continuance of the lease, and thereby determines the option of taking advantage of the forfeiture for condition broken.

The facts on this part of the case are, that Mr. Martelli by his correspondence asserted that he would not take the money as rent, or receive it under protest. Mr. Barnes, on the part of the lessee offered to pay the rent, and offered and tendered it to Mr. Martelli, the plaintiff's agent, as and for the rent, and required that it should be received, if at all, as rent. Mr. Martelli took the money up, making the observation that he would take it for the occupation. In my opinion he received it as it was tendered, viz. as rent. It was not offered as for use and occupation, or mesne profits; indeed, it could not be, as the amount or value of the occupation had not been ascertained. The money was tendered as rent, and being received, it is the receipt of rent, and therefore I am of opinion that there was a waiver of any of the supposed forfeitures.

MR. BARON BRAMWELL.—My Lords, in answer to your Lordships' first question, I must commence by saying I think it one of

¹ 8 T. R. 57.

considerable difficulty. The material facts are — [his Lordship stated them]. It is impossible to say that those boxes, included in both demises, were not charged from the 1st of August, *1852, to the 1st of February, 1854, — more than a year, *698 more than a season. The material words of the covenant are, “ that the lessee shall not grant away, assign, or let, charge or dispose of any box for any term or number of years whatsoever, or for any longer period than one year or season.” Now I quite agree that a lease or disposal of a box for a year or season to commence *in futuro*, is not of itself a breach of this covenant. It would not be within the words of the covenant. The box would not be let or charged for a longer period than a year or season. The proof is, that except for that year or season, the lessee might deal as he pleased with it. Besides, it is impossible to suppose that the lessee was to wait till the year or season began before he let; for if he was, he could not let for a whole year or whole season; nor could the difficulty be obviated by his agreeing to let when the season or year commenced, as that would be a charging or disposing of the box. So far then I have no difficulty in agreeing with the opinions expressed in the Courts below, that a lease for a year or season to commence *in futuro* is not a breach of the covenant.

With respect to the authorities cited to show that a power to lease does not authorise leases in reversion, it is enough to say that that was originally determined when the Courts were more prone to make bargains for people than they are at present; that the rule was established, as to an enabling power, on the reason of the thing, which here is in favour of the restraining power not being construed to prohibit leases to commence *in futuro*. But the difficulty I have felt is, that there is a box charged for a longer period than a year. Whether or no that is a breach of the covenant seems to me to depend on whether or no the covenant means that no one letting or charging shall be for more than a year, or that no one or more in the aggregate * shall be for a longer *699 period than a year. After great doubt I have come to the conclusion that the former is the construction, and that several lettings, not colourable, but *bond fide* covering a period of more than a year, are no breach of the covenant. The words “ shall not grant,” &c., “ for any term or number of years, or any longer period than one year,” are inaccurate; for a grant or demise for the period of a year is a grant of a term. They must therefore be

read, "for any term or number of years, or any period longer than one year or season." But, according to the literal meaning of the words, the lessee has not granted away, assigned, or let any box for any term, number of years, or period longer than a year or season; for the literal meaning is, that no one act of letting, &c. shall be for more than a year, and no one of the periods of letting is more than a year. And it seems to me that the reason of the thing is in favour of this construction, on the same grounds as those which justify the construction that he may lease *in futuro*; for it seems unreasonable to say that the lessee could not, just before the conclusion of one season, make a new engagement for the next, or that, having in January let a box for a year from 1st March, he could not in February let it for the night. So, if a person contemplates absence from London for a year, and then returning, wished to engage a box for the year of his return, I cannot think that it was either intended that that might not be done, or that, if done, the box must remain empty during the intervening season. This view is confirmed by the clause, that the lessee "shall not grant any seat or privilege of admission into the said boxes or stalls, or any other part of the theatre, to any person for any longer period than a year or season"; which, to my mind, means that no one grant shall in itself be for more than a year.

This reasoning applies to the words "grant away, let, *700 *assign"; but the difficulty to my mind arose more on the words "charge or dispose of." I think, however, they must be taken to mean, as the others do, charge or dispose of by one act of charging or disposing for a period of more than a year. The reasons are the same (I mean those of convenience); so also the literal meaning of the words is as I have suggested. In truth, the plaintiff proposes to read this covenant thus, "shall not grant away, assign, let, charge, or dispose of any box for any term or number of years, or for any period longer than one year or season, or for any terms or number of years, or any periods in the whole longer than a year or season." Nor do I see any thing in the construction which I put on these words opposed to the object of the covenant; that object I imagine to have been, that in the hands of the lessee or his assigns (for he may assign) the theatre should be unencumbered, so that the lessee should be a solvent and responsible person; and that sub-leases of the whole or part were not to be permitted, so that the lessee is the undertaker of the theatre.

But why is not that object accomplished by a covenant having the meaning I give to this? It does prevent the lease of any box or number of boxes to the same person for more than a year; for it is clear that a lease to A. for one year, and then another to him for the next, and so on, would be found to be colourable, and to be the result of one agreement to let for two years, which would really be a letting and charging for two years. I therefore answer your Lordships' first question in the negative.

As to the second question, the facts are — [his Lordship stated them]. These warrants of attorney are not found to be colourable, that is to say, it is not found that there was any bargain between the defendant and Hughes to charge this lease or the defendant's property generally; and though your Lordships have power to draw inferences of fact, it * seems to me clear that * 701 there is no ground, and indeed I think there is no evidence on which it could be found, that any thing more or other was meant than was said, or that there was any bargain between the defendant and Hughes that Hughes should register the judgments. The stipulation in the warrant of 6th October, 1852, imposed no obligation on Hughes, as is manifest from its giving him power "when he thinks fit," and indeed is one merely introduced *ex majori cautela*, for fear it should be said that not only was there no power till default of payment to issue execution, but that there was also none to sign the judgment and register it.

It is also to be borne in mind that Hughes did not know till after his first loan that the defendant was lessee of the premises in question, that when he first learned it, he was also informed of other alleged property of the defendant, and that if he trusted to the lease, he might calculate on it as a security in a way clearly not a breach of the covenant, viz. as a lease to be seized and sold under a *fiери facias*. I think, therefore, there is no ground to hold either that there was a bargain that the lease should be charged or made available contrary to the covenant, nor that it was the necessary result of the defendant's acts even if he made default, and Hughes had recourse to the lease as a means of payment.

These seem to be the facts: The covenant alleged to be broken is, that the lessee "shall not charge or encumber the said theatre or the income thereof, or the terms hereby granted, by mortgaging the same, or granting any rent charge, or any other encumbrance or encumbrances whatsoever." Now, he has not mortgaged the

theatre, its income, or the terms, nor has he granted a rent charge. Has he then charged or encumbered by granting any other encumbrance? I am of opinion that he has not; and that

* 702 * your Lordships' second question must be answered in the negative. I do not dispute that the registered judgments were charges on the theatre, on these leases, and on the defendant's interest in the premises; nor do I doubt the authorities cited on this point; indeed, nothing can be plainer than the Statute 1 & 2 Vict. c. 110, § 13. My opinion is founded on this, that the defendant has not granted the charge or encumbrance. The covenant, to my mind, prohibits an act which is intrinsically an encumbrance, not an act which may or may not lead to encumbrances, *Hill v. Cowdery*.¹ Suppose the lease had been granted before 1 & 2 Vict., and a warrant of attorney given and judgment signed and registered, would the act have transferred that into the grant of an encumbrance? Suppose the lease granted after the judgment registered, or after the warrant of attorney and before judgment, would the lessee have granted an encumbrance on it? Or if it had been assigned to a person who had such a judgment against him, would he have granted an encumbrance? It is in vain to say the case is within the mischief intended to be guarded against by this covenant. It may be that had the lessor thought of it, he would have included it in the words used, and that the lessee would have agreed thereto; but he might have dissented; whether or no, your Lordships cannot make an agreement for the parties, however fair or reasonable. If the plaintiff is right, I see not at what his argument is to stop. He reads the covenant thus, "shall not grant any encumbrance or do any act which may lead to an encumbrance, or without which there could not be an encumbrance"; so that not only the giving of the warrant of attorney is a breach of the covenant, but so also is the giving of the Judge's orders, as indeed the plaintiff contends, so also the incurring

* 703 of any debt or the * not paying of it, so also the negligent driving of a carriage whereby damage ensues.

I think the authorities in favour of the defendant in point: *Dodd. Mitchinson v. Carter*.² The same case was afterwards differently decided,³ not from any change of opinion, but because it was there found (which I say is not and cannot be found here), that the real

¹ 1 H. & N. 360.

² 8 T. R. 300.

³ 8 T. R. 57.

state of things was an agreement between the lessee and the pretended execution creditor, that the former should assign the lease to the latter, using the machinery of an action and execution to do it. Lawrence says expressly, "that the parties agreed to assign." See also *Lane v. Horlock*,¹ and the remarks of the Lord Chancellor,² where an opinion is expressed which in principle is in point for the defendant. The cases also as to charging benefices by warrants of attorney seem to me in point.

With great submission, it is wrong to say it was the intention of Lumley there should be a charge; he had no intention on the point. But the capital fallacy is to call the judgment and the registry the necessary consequence of his own act, and intended by him. They were not a necessary consequence, they were not even a consequence, no more than they would have been of his incurring a debt, which not being able to pay caused him to be sued, and so caused a judgment, and so a registry, and so a charge. The warrant of attorney was not *causa causans*, though it was a *causa sine qua non*. The forfeiture is to be his act of granting. When did he forfeit? When he gave the warrant of attorney, without more? Certainly not. When the judgment was signed and registered? That was not his act. But, further, the words are not, if he shall cause an encumbrance, but if he shall grant it. Assume that a *remote causing might be within that word had it *704 been used; surely the word "grant," means such a granting as takes place when a rent charge is granted. Surely, if the parties meant this case to be included, they would have said so plainly. Why does not the general rule apply that a grant *eiusdem generis* is meant by the word "other"?

A further question has been made. viz. whether the 1 & 2 Vict. c. 110, § 13, cannot apply where its application would work a forfeiture. On the other hand, it is said these words are express, and extend to all interests which the debtor has or could charge, and *Watts v. Porter*³ is cited. It seems to me that the true construction of the statute is on this point against the defendant; there is no exception in the statute; the term was an interest the defendant had and could charge, and if the words of the lease had been, as the plaintiff in fact says they are, viz. "grant any encumbrance or do any thing which may tend to or without which there could

¹ 5 H. L. Cas. 580.

² 5 H. L. Cas. 595, 596.

³ 3 Ellis & B. 743. But see *Beavan v. Lord Oxford*, 6 De G., M. & G. 507.

not be an encumbrance," the case would clearly have been within it. Here the defendant could charge the lease. It is true his doing so would be contrary to his covenant, and would give his lessor a right of re-entry, but if done openly would not be dishonest, and, however hard it might be, I think the statute would apply. The suggestion on this point seems to me more valuable in assisting in putting a true meaning on the covenant than as being intrinsically well founded.

In answer to your Lordships' third question, I am of opinion that had there been any breach of either of the covenants in question, the lessor would have a right of entry; clearly he would, if the covenant mentioned in your Lordships' first question was broken; as to the other covenant, the question depends on *705 whether doing a thing * prohibited is making default of or in performance within the meaning of the proviso for re-entry. I think that default of or in performance of all covenants to be performed, observed, and kept, applies to covenants not to do something, as well as to covenants to do something.

The last question put by your Lordships divides itself into two, viz. whether there was an act in itself an act of waiver? if so, whether it operates in respect of breaches of covenants not known to the plaintiff or his agent at the time of the supposed act of waiver. On both these points I conceive your Lordships desire our opinion. The common expression "waiving a forfeiture," though sufficiently correct for most purposes, is not strictly accurate. When a lessee commits a breach of covenant, on which the lessor has a right of re-entry; he may elect to avoid or not to avoid the lease, and he may do so by deed or by word; if with notice, he says, under circumstances which bind him, that he will not avoid the lease, or he does an act inconsistent with his avoiding, as distraining for rent (not under the Statute of Anne), or demanding subsequent rent, he elects not to avoid the lease; but if he says he will avoid, or does an act inconsistent with its continuance, as bringing ejectment, he elects to avoid it. In strictness, therefore, the question in such cases, is, has the lessor, having notice of the breach, elected not to avoid the lease? Or has he elected to avoid it? Or has he made no election? See the judgment in *Jones v. Carter*.¹ Now, in this particular case the facts are, that Martelli (who may be considered the lessor), had notice

¹ 15 M. & W. 718.

of some of the supposed breaches, and was willing to accept a sum equal to the rent, without signifying his election to avoid the lease or not. Mr. Barnes, who may be considered the lessee, *was willing to pay this money, but as rent, and as rent *706 only; after negotiations they met, each abiding by his own proposition; Barnes placed the money on the table repeating he paid it as rent; Martelli took it up repeating he took it as compensation for the occupation of the premises merely: did he thereby elect to treat the lease as existing, or preclude himself from treating it as void? Now, this question supposes there was a breach of covenant giving a right of re-entry; and it supposes, therefore, that if the lessor elected not to treat the lease as void, rent was due to him; if he did elect to treat it as void, that a compensation was due to him and not rent. Now, I take it to be clear that the lessor could not do an act affirming the tenancy, and yet say he did not elect not to treat the breach as a forfeiture; for instance, he could not distrain for rent due at Christmas, and at the same time effectually say, that he did not elect to treat an antecedent breach of covenant as a forfeiture; his act would be taken to be rightful, and bind him, rather than his words make his act wrong; so if the lessee had sent the rent in a letter, the lessor could not have kept the money, answering that he kept it, not as rent but as compensation, and then afterwards say he had not received it as rent. So here Martelli had no right to take this money except on the terms on which it was offered to him. It is clear it was never offered to him on the terms on which he said he was willing to take it, nor was any assent given to his taking it on those terms. Did he then take it wrongfully? Can he be allowed to set that up? Surely not. The remark in the judgment of the Court of Queen's Bench is well founded, that "if the party to whom money is offered does not agree to apply it according to the express will of the party offering it, he must refuse it, and stand upon the rights which the law gives him." This opinion is not inconsistent with the *authorities. *Webb v. Weatherby*¹ *707 shows that a payment must be taken as well as made in satisfaction, but it does not show that the mind of the payee must be satisfied, nor that he may not by his conduct preclude himself from denying that he is satisfied. *Hardman v. Bellhouse*² was cited; but that case does not show that the plaintiffs could say

¹ 1 Bing. N. C. 502.² 9 M. & W. 596.

they did not take the bill in satisfaction, if the keeping of the bill was wrongful, unless it was kept in satisfaction ; so in *Doe v. Batten*,¹ where the intention of the parties is spoken of, it is not meant that the landlord can do an act lawful, only if he has a particular intention, and yet say that he had it not. Further, what is to become of the money ? Can Martelli keep it otherwise than as rent ? Can Barnes get it back ?

I am of opinion, therefore, the act was one of waiver. It may seem a refinement, but had Mr. Barnes given the money to Martelli, that is, put it into his hand, after the latter had refused to receive it as rent, I should, on similar principles, have thought it not a receipt of rent, and not a waiver. But I cannot think it was a waiver of unknown breaches. I do not find there was any notice of the lease to Brandus, nor any evidence of any such notice. I think the judgment of the Court of Queen's Bench wrong in speaking of "this breach." I think, if any, there were several breaches ; that is to say, if the letting of the boxes was a breach, it was a separate breach ; if giving a warrant of attorney was a breach, each giving was a breach. Try it in this way : — Suppose the lessor had released the breach of covenant not to encumber so far as relates to the leases of the boxes, would that have released the others ? In the case put in the Court of Queen's Bench, had the lessor released the breach in removing manure, no mention

* 708 * would be made of the quantity, nor would there be any identification of what was released or waived, except the act or breach generally. But suppose there had been two entirely distinct removals, one in one year, and the other in another, and one only specifically released ; or, suppose a release given for non-repair of the shed, or a waiver of forfeiture in respect of it, and afterwards a discovery that the house was in danger for want of internal repair, nothing would be waived or released except the breaches specified. I cannot, therefore, assent to this part of the judgment ; and in answer to the last question, I say that such breaches, if any, as were known were waived, and no others.

MR. JUSTICE CROMPTON. — As to the first question proposed by your Lordships, I agree with the judgments pronounced in the Courts below, that there is no breach. It seems to me that the lessee never, at any particular time, did more than let or charge

¹ Cowp. 243.

the boxes in question for the next year or season. The lessee had at any time a right to let for a year or season, which I think is fairly construed to mean the ensuing year or season ; and the covenant cannot reasonably be construed to mean that he must wait until such year or season has commenced. His letting or charging for the ensuing year or season, even though the preceding one was not entirely terminated, does not seem to me a breach of the covenant fairly and reasonably construed. I answer your Lordships' first question, therefore, in the negative.

As to the second question, I think that the special case does disclose a breach of the covenant not to charge or encumber the theatre or the term granted by the lease. It seems to me that the judgment on the warrant of attorney, executed on the 6th October, 1852, amounted to a charge or encumbrance within the meaning of the covenant.

* The defeasance shows that the warrant in question was *709 to have been executed, together with the indenture of the 1st of August, when there was a further advance of 290*l.*, and that the execution of the warrant had been delayed ; and it is expressly given as a concurrent security with the indenture for the better securing the 290*l.* advanced.

It is not the giving an earlier judgment in an adverse action, nor even giving a security, for an old debt, if that would have made any difference, but the judgment according to the terms of a previous negotiation is expressly given, and is to be registered as a concurrent security for the advance of money. The lessee gives the warrant with the expressed and avowed object of the judgment being registered against him as a security for the money advanced.

It is a security, and the money is secured thereby, and charged upon the subject matter of the security. The provisions for registration show that it was contemplated that lands should be part of the subject matter of this security, and at all events the security, when acted upon according to the expressed intention of the parties, would form a charge or encumbrance on the land. The Statute of 1st Victoria expressly makes the judgment when registered a charge as against the judgment debtor, whatever may be its effect as against other parties, and it is the interest of the lessee, that is, the term, which it is the object of the covenant to preserve unencumbered.

It is said that until the judgment was signed there was no such encumbrance, and that the signing the judgment was the act of the creditor and not of the lessee, and it might have happened that the party died, and that no judgment could have been signed. It is quite true that there would have been no encumbrance and no

breach of the covenant if judgment had not been signed,
 * 710 from death * or any other reason; but the question is, whether the signing of the judgment was not really the act of the party giving the warrant, with the intention that it should be used for a security, and should not be enforced by execution immediately. It seems to me that the acting on the warrant and signing the judgment is for the present purpose the act of the giver of the security, just as much as the giving a warrant of attorney may be, if such was the intention of the giver, the causing his goods to be taken in execution under the Bankrupt Act.

In the case of *Doe v. Carter*, the covenant was "not to assign," and certainly the giving the warrant of attorney was not a direct assignment; but even in that case, when it was made to appear that there was an intention to do circuitously what the covenant forbade, it was held that there was a breach of the covenant. The present case appears to me much stronger, as the covenant is against charging or encumbering the theatre, &c., &c., or the term by mortgaging or granting any rent charge, or any other encumbrance or encumbrances; and the direct consequence of the judgment is the creation of a charge or encumbrance; and the defeasance shows that the object was that the judgment should be a security. It is not the case of a roundabout way of assigning, but of causing and creating a direct charge upon the land. It seems to me that a judgment binding the lands cannot be taken otherwise than as a charge or encumbrance on the lands; and I cannot help coming to the conclusion that the lessee in the present case, whether he had or had not the particular property in his contemplation, did, in point of fact, create an encumbrance or charge upon it within the meaning of the covenant in question. The

covenant being that he will not charge or encumber, the in-
 * 711 tention seems to me only material * for the purpose of ascertaining whether the charging is his act, as, if it be so, he has charged the term, and broken his covenant against so doing.

Suppose, instead of the covenant against doing an act by way of encumbrance, the covenant in a conveyance of the land had been

that he had done no act to charge or encumber the lands, and it had afterwards appeared that the covenantor had suffered a judgment on purpose to bind the lands in question, could it be doubted that the covenantee might maintain an action for damages sustained in consequence of such judgment.

But it is said, that although the theatre or the term was charged or encumbered, still that the generality of the earlier words in the covenant are restricted by the latter words, "by mortgaging or granting any rent charges or other encumbrance or encumbrances." It would, however, be a very narrow construction to hold that the word "granting" was used in its technical sense, as referring to something which lies in grant, or that the instrument must be a specialty. If that had been necessary, the warrant was under seal and was given as part of a mortgage security; all the instruments relating to the transaction really being one mortgage security.

It is said also that the "other encumbrances" should be of a similar nature with those that precede, as mortgages or rent charges. The words "any other encumbrance or encumbrances" are, however, very large, and were intended, I think, to be so; and they seem to me quite wide enough to embrace a charge or encumbrance by way of a registered judgment; and I think that, construing the words as we ought to do in an instrument of this description, according to the plain ordinary sense of the words, and with reference to the objects in view, such an encumbrance so created as * the one before your Lordships may * 712 well be said to have been an encumbrance granted by the lessee.

In the present case I would ask, first, was this property, with the lessee's other landed property, encumbered or charged by this judgment? And, secondly, was it so encumbered or charged by his direct authority given for the very purpose of creating such a charge or encumbrance on his landed property as security for the money advanced? I think that the answer must be that it was so charged or encumbered, and by his authority, given for that express purpose, so that the act of encumbering or charging is really his.

I concur, therefore, in this respect with the opinion given by those learned Judges of the Court of Queen's Bench who decided the case in that Court, and who held that there was a breach of

the covenant not to charge or encumber, and I accordingly answer your Lordships' second question in the affirmative.

I answer your Lordships' third question also in the affirmative, by saying that, in my opinion, the plaintiff acquired a right of re-entry by reason of the breach of covenant referred to in the second question.

As to the last question proposed by your Lordships, I am of opinion that, assuming that a right of re-entry had been acquired, it was not waived by the plaintiff in error. The facts of this part of the case are, that the lessee offered to pay a sum of money as rent accruing after the alleged forfeiture, and refused to pay it in any other shape; and the lessor's agent refused to receive it as rent, setting up and insisting on his right to re-enter for a forfeiture; and, finally, took up the money, saying at the time, that he took it as compensation for the occupation of the premises merely, and not as rent due under an existing and unforfeited lease, and that he did not waive the lessor's right of re-entry, but expressly reserved it. In effect, he received it only as compensation money, to which he was entitled for the continued occupation and overholding, if the tenancy had been, as he insisted, determined by the forfeiture.

Where a lessor has so conducted himself as to have bound himself conclusively by having treated the relation of landlord and tenant under the original lease as having existed between him and the lessee subsequently to the supposed forfeiture, he is said to have waived the forfeiture. The lessor in such case, as explained in the note to *Dumpro's Case*,¹ has elected, as he is entitled to do, to keep the reversion, instead of insisting on the forfeiture and determination of the lease. But where, as here, he always insists on the forfeiture, he cannot be deemed to have made any such election to keep the reversion. What is called a waiver is not so properly a forgiveness or a condonation or release of a breach of covenant, as an election to take one estate instead of another. Viewing it in this light, the question whether the lessor knows or not of any of the particular breaches does not appear to me to be material, as the question really is, does he know or suppose that he has the election in consequence of some breaches, and does he elect still to keep the reversion? Considering it as an election, it certainly appears strange that he should be deemed to elect against

¹ Smith's Leading Cas. (4th ed. vol. 1, p. 25 - 33, n.)

his expressed determination communicated to the other party at the time, unless, indeed, his act is inconsistent with any other explanation. A receipt of rent, *eo nomine* as rent under the lease, at least if unaccompanied by any explanation, is an unequivocal act of electing to keep the reversion; so is a distress in cases where it can only be justified by the continuance of the tenancy.

* The authorities appear to me to be in accordance with * 714 what seems to me the common sense of the case, where the party refuses to receive the rent as such.

Lord Mansfield's observations in *Doe v. Batten*¹ are strong and express, and it is clear that the receipt of rent cannot in every case be treated as necessarily waiving the forfeiture, or else it must have had that effect in *Doe v. Meux*,² approved of in *Jones v. Carter*.³ It is true that in all these cases the receipt of rent had been preceded by an ejectment, or some unequivocal act of election, which, according to the doctrine of election, is conclusive when once made; but still the receipt of the rent, though unequivocal, did not necessarily operate as a waiver. In the same way, I think, it may be explained by evidence of conduct at the time, showing that the lessor, whilst he receives the money, is electing to have the land, and not the reversion, as he did in the present case.

I think that, in order to operate as an election to keep the reversion, the money should, in the language of Mr. Justice Parke, in *Doe v. Pritchard*,⁴ "be received as rent due under the lease." In the present case there was a direct insisting on the forfeiture, and there was a distinct refusal to consider the tenancy as subsisting.

The rule of law that payments are to be taken *in modo solventis* is a rule of appropriation where there are two debts or demands, and a payment by the debtor, expressly in satisfaction of one demand, precludes the creditor from maintaining an action for that debt or demand, on the ground that it has not been paid; but that is a very different matter from his being bound to admit that such a demand did exist, when he claims the sum on a different footing. The rule does not appear to me to apply to a case

* where there is one sum due or claimed in one or two ways, * 715 so as to bind the party receiving the money to an affirmation of the existence of a fact which he is distinctly repudiating. In the present case the plaintiff refused to receive the money as

¹ Cowp. 243.

² 15 M. & W. 718.

³ 1 Car. & P. 346.

⁴ 5 B. & Ad. 765, 780.

rent, refused to recognise the tenancy as existing, and insisted on the forfeiture. I think that he cannot, under such circumstances, be treated as electing to have the reversion of the tenancy, and as waiving the forfeiture, and in this respect I differ from the conclusion at which the Court of Queen's Bench arrived.

I answer your Lordships' last question, therefore, in the negative.

MR. BARON MARTIN. — In answer to your Lordships' first question, I say that the special case does not disclose a breach of the covenant not to grant, let, or otherwise dispose of certain boxes of the theatre for a longer period than one year or season. In order to determine what is its true meaning, it is necessary to ascertain what was the subject matter of the demise; what circumstances, if any, were peculiar to it; and more especially what is the meaning of the word "season," as mentioned in it, and with this knowledge to read the covenant, and endeavour to determine what its words really mean.

The subject of the demise was the Opera House in the Haymarket, and there is a covenant in the lease that it should be made use of by the defendant solely for the acting of operas and such theatrical entertainments as had been usually given therein; and the special case finds that the season for such entertainments is from March to August in each year. The defendant was at liberty to let the boxes above referred to for one year or season, but not for any longer period; and the object of the covenant

*716 *probably was to secure as far as was possible that the annual profits should be available to meet the current annual expenses. This would strongly tend to secure a fund for the payment of the rent, and also for the carrying on the business of the Opera House, a most important object to the lessor, as is apparent alike from the reason of the thing as from the terms of the lease. Now, what the defendant did, which is alleged to be a breach of the covenant not to let for more than a year or season, is this — [his Lordship stated the facts.] The special case finds that in 1852 the season closed on the 13th of August. Now, if the lease to Mr. Hughes had been executed on the 14th of August, I apprehend it would have been clear that the defendant had not let or charged the boxes for more than one season. The season of 1852 would have been then over, and the letting or charging to

Messrs. Brandus would have been substantially at an end, all the beneficial interest under the grant or demise would have terminated, and the demise to Mr. Hughes would be for one, viz. the then next season. Then does it make any difference that the demise to Mr. Hughes was executed upon the 1st of August? Upon the best consideration I have been able to give the question, I think it does not; and that there has been no letting for a longer period than one season within the true meaning of the covenant. The season of 1852 was substantially over on the 1st of August, 1852. This was the usual period for its termination; the thirteen days afterwards during which the performances took place, was an excrescence upon what was usual. The spirit and intention of the covenant seems to me to have been carried out, and in the result the plaintiff has failed to satisfy me that the lease to Mr. Hughes was a breach of the covenant. He was bound to do so to entitle him to any judgment, and he has not succeeded.

* In answer to the second question, I reply that the special * 717 case does not disclose a breach of the covenant not to charge or encumber the theatre. The point is, whether the giving certain warrants of attorney was a breach or breaches of the covenant that the defendant should not charge or encumber the theatre or the term granted by the lease by mortgaging the same, or granting any rent charge, or other encumbrance whatever. The strongest case against the defendant was the warrant of attorney to Mr. Hughes, dated the 6th of October, 1852, and it is therefore sufficient to refer to it. [His Lordship stated the warrant and defeasance.] The question is, whether there was a charging or encumbering the theatre within the true meaning of the covenant, and I think there was not. A warrant of attorney is a well-known security. It gives the creditor the power of obtaining a judgment in one of the superior Courts, and enforcing it, precisely in the same way as an adverse judgment. Should the defendant pay the debt, no judgment could be entered up at all; but if he does not, and judgment is entered, the lands of the debtor are charged, and may be taken in execution. When, therefore, a man gives a warrant of attorney, he does an act whereby his lands may be charged; but he does the same thing when he contracts a debt, for he may be immediately sued for the debt, and judgment obtained against him, and thereby his lands are charged in the same manner and to the same extent as by a judgment on a warrant of attorney. It is not cor-

rect, therefore, to say that a man charges or encumbers his lands by giving a warrant of attorney. What he really does is, he gives the means whereby his creditor may charge or encumber his lands. In the special case nothing is found beyond the fact that the warrant of attorney was given ; it is not found that it was the
 * 718 object and intention of the parties that the *theatre should be charged by means of the judgment. Your Lordships have power to draw inferences of fact ; but I do not think there is sufficient evidence that the parties had any particular intention to charge or encumber the theatre, or that the warrant of attorney was given otherwise than as an ordinary security. It is stated in the defeasance that Mr. Hughes was to be at liberty to register the judgment, but in reality this is nothing more than he could have done without such words ; and they seem to me to have been inserted in the defeasance merely *ex majori cautela*, and if omitted, it would have been of no consequence.

The true rule of law upon this subject appears to be laid down in the case of *Doe d. Mitchinson v. Carter*, twice reported.¹ It was an action of ejectment by a landlord upon an alleged breach of condition not to assign a term. The evidence at the first trial was that the lessee had given a warrant of attorney for a debt, that judgment had been entered up upon it, and execution issued, and the sheriff had sold the term to the defendant, who had entered and taken possession of the land. The Court held that this was not a breach of the condition. Another ejectment was afterwards brought, and this fact was then added, that the warrant of attorney was executed for the express purpose of enabling the defendant to obtain possession of the lease and the land demised, and in order to evade the condition. The Court then held that there was a breach, upon the ground that what cannot be done directly the law will not permit to be done indirectly. I think the principle of that case applies to the present point, and inasmuch as it has not
 been found in the special case, nor is there sufficient evi-
 * 719 dence to prove, that the warrant of *attorney by the defendant to Mr. Hughes was executed for the purpose of enabling him to get possession of the theatre, in my judgment there has been no breach of the covenant not to charge or encumber.

As to the third question proposed by your Lordships, I say that

¹ 8 T. R. 57, 300.

the plaintiff in error did not acquire any right of re-entry. I collect that your Lordships desire the opinion of the Judges upon the point, Whether, supposing there had been breaches of the covenants, would the plaintiff have acquired a right of re-entry? The condition upon which the first alleged breach is founded is express, and in the same words as the covenant; and if there had been a breach of this covenant, there would have been a clear right of re-entry. I think it would be impossible to put a different construction upon the same words twice repeated in the same deed. That upon which the second alleged breach is founded is a general condition that if the defendants should make default in the performance of any of the other covenants which on his part ought to be performed, observed, and kept (except certain particularly mentioned), it should be lawful for the plaintiff to re-enter, &c. And the point is, Whether, assuming the giving the warrants of attorney to be a breach of the covenant not to charge or encumber, the condition would reach it? I think it would, and that the executing a mortgage or granting a charge by the defendant would be a making default in the performance of the covenants to be observed and kept by him. I do not myself consider there is any inaccuracy in language in saying that a man has performed his covenant when he has not done what he covenanted not to do, or that he made default in performing his covenant when he has done it. The abiding by a covenant is a performance of it; the non-abiding a non-performance. It was clearly the intention of the parties that the condition should extend to *every breach *720 of covenant except those specially excepted; and, whether it be a condition or a covenant, the intention of the parties, as shown by the words they use, is the true test.

As to the last question, I think the receipt of the rent was a waiver of all breaches of condition which had happened before the rent became due, and which were known to the plaintiff, but was not in respect of any breach of condition not known to him. It was argued that the real question was, whether or not the plaintiff or the person who represented him intended to waive the forfeiture; but in my opinion this is not so. The rule laid down in *Co. Litt.*, 211 b, is, "if he accept a rent due at a day after, he shall not enter for the condition broken, because he thereby affirmeth the lease to have a continuance." In *Green's Case*, the rent had been duly demanded on the day, and not paid, but two days after-

MR. JUSTICE WILLIAMS. — In 'answer to your Lordships' first question, I have to state my opinion that the special case does not disclose a breach of the covenant not to grant, let, or otherwise dispose of any of the boxes or stalls of the theatre for any longer period than one year or one season. I think the meaning of the covenant is, that no one single letting or charging shall be for a longer time than one year or one season. With respect to this question, I believe the Judges are unanimous, and I will not, therefore, trouble your Lordships with any further explanation of my own on the subject, but take leave to say that I concur with the view of it which has been already expressed to you at large by my brother Bramwell.

As to the second of your Lordships' questions, I am of opinion that the special case does not disclose a breach of the covenant not to charge or encumber the theatre or any part thereof. The words of the covenant are that the lessee shall not "charge or encumber the said theatre by mortgaging the same, or granting any rent charges or any other encumbrance or encumbrances thereof whatsoever." It appears on the special case that judgments were signed and registered on warrants of attorney given by the lessee to secure money advanced to him, and the defeasances of some of those warrants expressly authorised judgments to be immediately entered up and registered. On the part of the appellant it is contended, not only that the judgments when so signed and registered constituted an encumbrance (of which, I think, no doubt can be entertained), but also that the lessee, by putting it into the

* 724 power of * his creditor so to sign and register the judgments, had broken the covenant by "granting an encumbrance." But I am of opinion that this is not so; for that when the covenant speaks of "granting any rent charge or other encumbrance," it means to prohibit encumbrances which will be immediately fastened on the estate by force of some grant or other act of the lessee, and not the doing of acts like giving these warrants of attorney, which may or may not end in becoming encumbrances at some future time, according to the course which the creditor chooses to take. It is plain that the mere giving of the warrants of attorney cannot constitute the grant of an encumbrance. They might have proved wholly inoperative, by reason of being countermanded by death before any judgment was entered, or the creditor might have chosen to neglect altogether to act upon them. And

if the giving of the warrants of attorney is not a grant of the encumbrance, how can it be said that the lessee granted it at all? It is plain that he did nothing else than give the warrants; the encumbrance was effected not by his act, but by the act of the creditor in signing and registering the judgment.

With respect to the authorities, the case most relied on by the plaintiff in error was *Doe v. Carter*.¹ But as to the application of that decision to the present question, I beg to refer your Lordships to the judgment of the Court of Exchequer Chamber in this case,² in which I concurred, and to which, I take leave to say, I continue to adhere.

As to your Lordships' third question, I am of opinion that if any breaches of the covenants occurred, the plaintiff in error acquired a right of re-entry; for I think the proviso in the lease is applicable to a breach of a negative as well as a breach of a positive covenant.

* As to your Lordships' last question, I am of opinion * 725 that the right of re-entry (if any) was waived by the plaintiff in error as to all the breaches of which he had notice. It was established as early as *Pennant's Case*,³ that if a lessor after notice of a forfeiture of the lease accepts rent which accrued after, this is an act which amounts to an affirmance of the lease and a dispensation of the forfeiture. In the present case the facts, I think, amount to this, that the lessor accepted the rent, but accompanied the acceptance with a protest that he did not accept it as rent, and did not intend to waive any forfeiture. But I am of opinion that this protest was altogether inoperative. As he had no right at all to take the money unless he took it as rent, he cannot, I think, be allowed to say that he wrongfully took it on some other account. And if he took it as rent, the legal consequences of such an act must follow, however much he might desire to repudiate them. But those legal consequences are only, I apprehend, that the lessor thereby affirms the lease and dispenses with the forfeitures of which he then had notice. The distinction has been long established between conditions which are collateral and those which are annexed to the rent; that, as to the former, notice of a breach is material and issuable. The reason is mentioned in the first resolution in *Pennant's Case*, viz. that if it were otherwise the lessee might take

¹ 8 T. R. 300.

² 3 Rep. 64 a.

³ 5 Ellis & B. 689.

advantage of his own fraud ; for he might purposely commit an act of forfeiture so secretly and so near the day on which the rent is to be paid as that it should be impossible for the lessor to come to the knowledge of it.

MR. JUSTICE ERLE. — I answer your Lordships' first question in the negative. The covenantor did not charge or dispose of any boxes for any longer period than one year or season.

*726 * The facts are, that the covenantor in December, 1851, charged and disposed of certain boxes to Brandus for one year from 1st March, 1852, and on the 1st August, 1852, he charged and disposed of the same boxes to Hughes for one year from 1st February, 1853. Neither of these instruments of charge, taken by itself, created a forfeiture, as there is no covenant against granting leases commencing *in futuro*, nor against granting leases in reversion, nor against granting leases that would not expire within a year from the making thereof, provided the term granted did not exceed a year or season. The plaintiff contends that the covenant was intended to prevent an anticipation of the profits, and to make the receipts of each year applicable to the expenses thereof. Probably it may be so, but no such intention is expressed. The prohibition in literal terms is against a longer term than a year or season, and neither of the grants in question violates that prohibition. There is no pretence for saying that the two grants were intended to be a colourable compliance, though a substantial breach of the covenant.

If the substance of the covenant is regarded, the lessee has substantially complied with it. All grants are operative only for the opera season, — the time during which the theatre remains closed is of no importance. The grant to Brandus is in effect for the opera season of 1852 ; and almost at the close of that season the grant to Hughes for the season of 1853 is made. If the season for 1852 had been over when the grant to Hughes was made, the plaintiff could not in reason contend that there was a breach, as there would be no charge or disposition for a longer period than a season, although for longer than a year. The covenant has thus been substantially complied with, and I cannot find a clear violation of the literal meaning of the words ; I therefore answer this question in the negative.

I answer the second question in the negative. No direct

* charge or encumbrance was created, nor was any indirect *727 power given of charging by a judgment coupled with an intention on the part of the covenantor that it should be used for the purpose of charging, so that the covenant might be apparently complied with, and really broken, as was the case in *Doe d. Mitchinson v. Carter*.¹

As my answer to the first two questions is in the negative, the third question does not arise. If either had been answered in the affirmative, the answer to the third question would be affirmative also.

The fourth question does not arise for the same reason. If it had arisen, the lessor waived all the breaches that he had notice of when he accepted a payment of rent accruing after notice, and if he had notice of several breaches of one covenant and waived them all, and afterwards discovered another breach of the same covenant, not differing in circumstances from the breaches which he had waived, I think the waiver would extend to such a breach, though unknown at the time of waiver.

MR. JUSTICE WIGHTMAN. — With respect to the first question proposed by your Lordships, I am of opinion that the special case does not disclose a breach of the covenant not to grant, let, or otherwise dispose of any of the boxes or stalls of the theatre for any longer period than one year or one season. My reasons for this opinion are the same as those given by both the Courts below upon this point, and I therefore will not repeat them.

The second question put by your Lordships is one of considerable difficulty, but after much consideration I have come to the conclusion that the special case does disclose a breach of the covenant not to charge or encumber the * theatre, or *728 any part thereof, and I therefore answer that question in the affirmative. The judgments upon the several warrants of attorney mentioned in the case, when entered up and registered, have, by the 13th section of the 1 & 2 Vict. c. 110, the same effect as a charge upon the theatre, as if the person against whom the judgment is entered up had had power to charge it, and had by writing under his hand agreed to charge it, with the amount of the judgment debt and interest. But though the judgment is a charge upon the theatre, it is not a breach of the covenant unless it be a

¹ 8 T. R. 300

charge by the lessee granting a rent charge or other encumbrance. The only act done by the lessee is the giving warrants of attorney to confess judgments, which warrants are in themselves neither charges nor encumbrances, but the judgments which the creditors are enabled to sign by means of them are. If the lessee had given to a *bonâ fide* creditor a promissory note payable on demand, upon which an action had been brought, and the lessee having no defence had given a cognovit upon which judgment had been signed, or had suffered a judgment by default, could he be said to have granted an encumbrance upon his leasehold property within the meaning of such a covenant as that in question? I think not; and the case would fall within the principle of the first decision in the case of *Doe d. Mitchinson v. Carter*.

But it is urged that the defeasances to the warrants of attorney, and in particular to that of the 2d of November, 1852, show that the object of the lessee was to create a charge upon the theatre by giving those warrants of attorney. The defeasance to the warrant of attorney of the 2d of November recites the debt to the creditor upon an overdue bill of exchange, and that the debtor (Lumley) had become party to an indenture for securing payment of the

debt for which the bill had been given, and then states
 * 729 * that the warrant of attorney is made and given, and the judgment to be entered up thereon forthwith is intended as a collateral security with the indenture for further securing payment of the debt and interest from the time the bill was due, and that judgment shall be forthwith, or at such time hereafter as the creditor shall think fit, entered up under the authority of the said warrant of attorney and be registered, and that it shall be lawful for the creditor immediately to issue execution. Judgment was signed on this warrant of attorney on the 4th of November, 1852, and registered on the 5th. By this warrant of attorney and defeasance, Lumley (the lessee of the theatre) authorised the creditor to enter up judgment forthwith, and issue execution immediately; and as the judgment, when signed, was by his authority and without any action brought, the effect was the same in charging the theatre as if the lessee had directly and in terms granted an encumbrance upon it; and I am, upon the whole, of opinion, that giving a reasonable construction to the term "grant," as used by the parties to the lease, Lumley did voluntarily create a charge upon the theatre, which operated as a grant of an encumbrance

within the meaning of the covenant. As I am of opinion that there has been a breach of the covenant not to charge or encumber the theatre, I am also of opinion the plaintiff acquired a right of re-entry under the proviso for re-entry in case of breach of covenant. And I therefore answer your Lordships' third question in the affirmative.

In answer to the fourth question proposed by your Lordships, I am of opinion that the right of re-entry was waived by the plaintiff in error. Acceptance by a landlord of rent accruing due from a tenant, after knowledge by the landlord of a breach of covenant by the tenant, which gives the landlord a right of re-entry on the ground of a condition *broken, amounts to a *730 waiver of the right to re-enter, as it is in effect an admission that the tenant held rightfully as such at the time the rent accrued. If it be necessary to cite any authority for this position, I may refer to *Green's Case*.¹

In the present case Mr. Martelli (who represented the plaintiff) was aware at the time he received the rent due at Michaelmas, 1854, that the plaintiff claimed a right to re-enter by reason of the warrants of attorney and judgments being, as alleged, grants of encumbrances within the meaning of the condition in the lease. He knew that that condition had been broken, and accepted rent accruing due after. It is true that he insisted upon receiving it, not as rent, but as compensation for occupation; but he was told by Mr. Barnes, who paid it, that he must either take it as rent or leave it. He chose to take it, but in that case is bound to take it as it was paid; or, if he objected to the terms on which it was offered as payment, he should have refused it. I therefore answer your Lordships' fourth question in the affirmative.

MR. JUSTICE COLERIDGE. — My Lords, in answer to your Lordships' first question, I think that the special case discloses no breach of the covenant therein referred to. It appears to me that that covenant contemplates the period for which, by the operation of any grant, sub-lease, or other instrument, the box or stall should be bound, not the time at which such grant, sub-lease, or other instrument should be made; and I think further, that, apart from fraud or colour, the granting of successive leases of the same box to the same tenant would not occasion a breach, although

¹ Cro. Eliz. 3.

these leases, or some of them, might be in existence, the
 *781 terms, however, under them *not running at the same time.

This last is, indeed, but a corollary from the former proposition. As I have been allowed to read my brother Bramwell's answer to this question, and agree to his reasons as well as his conclusions, I think it better to refer to them, and adopt them as my own.

I have had more difficulty in settling my mind as to your Lordships' second question, and it is only with some remaining doubts that I answer that the special case does not now seem to me to disclose a breach of the covenant not to charge or encumber the theatre or any part thereof. The covenant in question is — [his Lordship read it]. This follows on the covenant not to underlet or assign without the license and consent in writing of the lessor. The two may be considered as branches of one entire covenant, and perhaps the condition of a license from the lessor may attach to both, which would help to the construction I give to the part now under consideration. But whether this be so or not, I think that this branch, as well as the other, contemplates only acts done by the lessee and their direct consequences. As the lessee must grant the mortgage and the rent charge in order to break the covenant, so he must grant the encumbrance. It must be the direct consequence of some act of his that the term is to be encumbered. To adopt my brother Bramwell's language, his act must be the *causa causans* of the encumbrance, not merely the *causa sine qua non*. If his act may be complete, and yet no encumbrance be created, then he cannot be said by his act to have granted the encumbrance.

Thus far I proceed with considerable confidence. My doubts arise upon the application of this principle of construction to the warrant of attorney granted by Lumley to Hughes on the 6th of

October, 1852, and its defeasance. By the defeasance it

*782 appears that the warrant was given, *and the judgment to be entered up thereon was intended as a concurrent security

with others, which were by way of mortgage, for the payment of a sum of 290*l.* then advanced, on a future day named, and interest in the mean time, and that judgment should be entered up forthwith, or at such time as Hughes should please, and should be registered, but execution stayed until the happening of a default in payment on a day named. Judgment was entered up in October,

and subsequently registered, both in the Common Pleas Registry and in the Middlesex Registry. The judgment so entered up and registered clearly operated as a charge on the theatre, and on the terms under the 1 & 2 Vict. c. 110, §§ 13 and 19. But are the signing the judgment and the registering it the acts of Lumley or of Hughes? Simply to allow judgment to be signed for an admitted debt is no more to grant an encumbrance on the debtor's property, in the sense of a covenant against such granting, than to contract the debt, and after a hopeless and unconscientious litigation to have the judgment pronounced. In both cases the same result must equally have been within the contemplation of the borrower. So, again, to consent that the judgment, when entered up, shall be registered, is, in truth, to do nothing. Without the consent of the borrower the lender would have the same power to do the act as with it. Whether he will sign the judgment or not, and when signed, whether he will register it or not, depends on the election of the lender, and the only really effective part in this clause of the defeasance is the restraint upon the lender as to issuing execution on the judgment.

In the judgment of the Court of Queen's Bench, in which I certainly concurred, it is said, that "the defeasance shows the purpose, that it should be done by Lumley's authority, which amounts to a charge or encumbrance within the meaning of the covenant." The thing to be done here * referred to is the *733 appearing and confessing an action; but it is admitted just before, that a mere warrant to secure a just debt would be no breach of the covenant, "though it would lead eventually to the lease being taken in execution." Upon reconsideration I think that the difference between an ordinary warrant and the one now in question is nominal and apparent only. A purpose is expressed which else would be implied, and a permission given which could not be withheld, and which operates nothing, because the law would have conferred the same right without the concession of the party.

In answer to your Lordships' third question, I should be of opinion that a right of re-entry would have been acquired, by reason of each of the above-considered breaches, if I were wrong in the answers I have given to your Lordships' former questions, or either of them.

In answer to your Lordships' last question, I am of opinion

that the right of re-entry, if any, was entirely waived by the plaintiff; or perhaps, speaking more accurately, that the plaintiff estopped himself from insisting on it; and I found this entirely on the special circumstances disclosed in the special case, not contravening any of the principles of law relied on by those who maintain a contrary opinion. On this ground I think no distinction is to be made between breaches which Martelli, whom I take to represent the plaintiff, actually knew of, and those which he did not, because the substantial question between him, on the one hand, and Barnes, representing the defendant, on the other, was this, Will you accept this payment as rent, and thereby acknowledge an existing lease, or not? Now, this question being raised, where it is clear that Martelli considered that there were one or more

grounds on which a right of re-entry might be insisted on,

* 734 * and knew that Barnes meant to pay nothing unless it should be accepted so as to set up that lease as good against

all such rights, I think if he did accept the payment in such a way as to waive any rights, it must be taken that the acceptance would waive all. In effect, Barnes says, I will only pay on the footing of this being a good lease against all rights of re-entry, how many soever they may be; and if he had said this in terms, and Martelli without more had accepted the payment, he certainly could not have said afterwards, "I may still re-enter, because though I knew of some breaches, there was one, or it may be more, which I was ignorant of." The question then is, in my opinion, Did he accept the money so as to waive any single breach? Now it is true that he protested against doing so when he took up the money. But what were the previous facts, and the rights of the parties, and what did Martelli do? Barnes produces the money, there is a discussion, Martelli seeks to impose a condition, Barnes will not assent to it, and says, "As rent you must take the money or leave it." Martelli says, "I understand your meaning," and takes it; protesting at the same time that he expressly reserves the right of re-entry. These are the facts, and what were the rights of the parties? The money was the property of Barnes; with him lay the right to impose the terms on which alone Martelli could lawfully take it; while Martelli might insist on his alleged right of re-entry, or he might take the money and waive it; but I think he could not do both, take the money on the taking of which the owner had imposed a lawful precondition, and yet insist on the right of

re-entry, which was inconsistent with that condition. Considering the term imposed, Martelli's act and the declaration were inconsistent with each other, and when that is the case, the former is to be * regarded as binding, and not the latter. On this *735 ground, shortly stated, I answer your Lordships' fourth question in the affirmative.

April 17.

LORD CRANWORTH, after fully stating the case, said: With regard to the first alleged breach of covenant that Lumley would use his best endeavours to improve the Opera House for the purpose for which it was demised to him, of which it was alleged there was a breach by his not having kept it open in the seasons of 1853 and 1854, your Lordships at the time of the argument intimated a very strong and decided opinion that the facts warranted no such conclusion; that there was no pretence for saying that there had been any breach of the covenant upon that ground; that the meaning of the covenant was, that he should, by having proper scenes, and by having the house properly painted and kept in order, improve the house, but not if he found that there would be no benefit in opening the house at all; if it would not pay the expenses of having theatrical representation at all, that he should at his own loss, with no benefit to the landlord, keep it open without any corresponding advantage. Your Lordships expressed so clear an opinion upon that point at the time of the argument, that your Lordships did not desire even to hear what might be the opinions of the learned Judges upon it. I happen to know, by communicating with them at the time, that they never had the slightest doubt upon the subject; but your Lordships did not put any question to them upon that point.

Your Lordships put four questions to the learned Judges, and they have given very elaborate opinions in answer to all these questions. They all say that in their opinion there was no breach of the first covenant; that is, the covenant not to let for more than one year or one season. *Seven out of the *736 nine Judges say that there was no breach of the second covenant, that is, that there was no breach of the covenant not to encumber. Of the two learned Judges who consider that there was a breach of that covenant, one thinks that the right of re-entry which accrued in consequence of that breach,

was waived by the subsequent acceptance of rent, the other thinks that there was no waiver. The result, therefore, is that all the Judges but one are of opinion that the judgment was rightly given for the defendants below, who are the defendants here. One of the learned Judges, Mr. Justice Crompton, who thinks not only that there was a breach, but that there was no waiver, is of opinion, in opposition to the other eight Judges, that the plaintiff ought to have judgment.

My Lords, in this state of things it is now your Lordships' duty to decide in the first place upon the first point, upon which all the learned Judges concur. I think there can be no possible doubt that your Lordships will at once accede to the view which they took on that subject. This is a question as to the forfeiture of a lease. The covenant is, that the defendant, the lessee, will not underlease any of the boxes or stalls for more than one year or one season. Now the leases in question which were considered to be breaches of that covenant, were leases which were entered into in the month of August, 1852, for the year commencing from February, 1853. That was not the exact form of all of them; but that statement will substantially embrace the whole question as to that breach. It is said that that lease is a breach of the covenant not to lease for more than one year: the learned Judges think that that is not so.

How is that a breach of the covenant not to lease for more than a year? It is a lease for only one year. It was said that *737 it is a breach, because it is a reversionary lease; *that where there is a power to lease, although nothing is said of it being a lease in possession, by implication of law it is understood that it must be a lease in possession. But this is not a lease under a power which the party could not execute but for the power; this is a lease by a party having an absolute interest, I might say for this purpose a fee simple, though it is only a long term of years. He has an interest which enables him to grant a lease, and it is a covenant in restraint of his ordinary common right and power arising by virtue of his interest in the property, restricting him from doing that which but for that covenant he would be entitled to do. The covenant is that he will not lease for more than a year. He has not leased for more than a year; therefore, he has not in terms broken the covenant. I doubt whether we ought to go beyond that.

But it was said that that construction might enable the party

entirely to defeat the primary object of the parties to this covenant; I do not think it is so at all. We need not decide what would be the case if a lease had been made to a party for one year, and then again at the same time, concurrently with that, a lease for another year to commence at the end of the first year, and so on. It might be that that might have been held to be a lease for more than a year, although, in point of fact, it may appear to be otherwise. That is not the question which we have to decide. This is simply a question whether, either in form or in substance, it is any violation of the covenant to have made a lease which was to endure for one year, and one year only, commencing at the beginning of the ensuing season? I am of opinion that it was not, and that therefore the learned Judges are quite right; indeed, upon this part of the case no possible doubt can be raised.

The second alleged breach is certainly one which gives *rise to somewhat more difficulty, namely, whether the *738 warrants of attorney which have been given were or were not a breach of the covenant not to encumber. The warrants of attorney relied upon are several. In the first place there was a warrant given to Hughes on the 25th of June, 1852, to confess judgment for a sum of money, being the amount of several bills of exchange which were enumerated, and which would become due on certain days in the ensuing months of August, September, and October; upon that, judgment was signed and duly registered both in the Judgment Office and also in the county of Middlesex. There was another warrant of attorney in the following month, the 29th July, 1852, for 2200*l.*, to secure 1070*l.* on the 30th of September, upon which judgment was also signed. And there was another upon the 6th of October, 1852, for 12,000*l.*, to secure 6000*l.* And there were also several Judges' orders that are referred to in the case, the details of which it is not necessary to mention. They are merely Judges' orders, I think from twelve to twenty in number, to secure sums of money for which Lumley had been sued, and which orders had been given (I think in every case it is so stated) after issue had been joined, and all for *bond fide* debts.

The question here arises upon the Act 1 & 2 Vict. c. 110, § 13, whether these instruments do or do not amount to such an assignment or charge of the property as to constitute a breach of the covenant not to encumber. The 13th section of that Act

enacts — [his Lordship read it]. The question is, whether a warrant of attorney given under the circumstances stated in this case, namely, *bond fide* given to secure debts, and nothing more being stated than that, does or does not amount to giving an encumbrance within the meaning of this clause.

This is a point which has been several times of late
 * 739 * under discussion, — I have more than once in the discharge of my official duties had occasion to consider it, — and I confess it is a point upon which I have very often had great difficulty in making up my mind, but in the result I still adhere to the opinion which I expressed in this House two or three years ago, in the case of *Lane v. Horlock*.¹ This is a point upon which it is impossible to state any abstract rule that shall govern every case; but I am of opinion, as I there stated, that simply giving a warrant of attorney, if it is *bond fide* given to secure a debt which the party might recover by process of law, and in respect of which if the debtor does not give a warrant of attorney, the creditor will recover judgment adversely; in such a case a warrant of attorney given in order to avoid the expense of law proceedings, is not a charge within the meaning of that statute. But if a person, not having a power of assigning or charging the property, gives a warrant of attorney with a view to evade that restriction which is imposed upon him, then the circumstances may be such as to make it amount to a charge or encumbrance, or at least to estop him from saying that it is not a charge or encumbrance to all intents and purposes.

The distinction is admirably illustrated by the case of *Doe d. Mitchinson v. Carter*,² in which the principle was elucidated in both its aspects, for in the first instance there had been an ejectment brought, and there it was found that a person who was restrained from assigning, had given a warrant of attorney. The Court of King's Bench, after a long argument, held that that did not amount to a breach of the restriction against his charging the property. He could not help his creditors bringing an action

* 740 * and recovering judgment, and if he, to save the expense and vexation and delay of an action, gave a warrant of attorney in order to close the proceedings at once, the Court held that he might lawfully do that in order to arrest the legal consequences, and that therefore that was no breach. But a second

¹ 5 H. L. Cas. 580, 593.

² 8 T. R. 57, 300.

ejectment was afterwards brought, in which, I think upon a special verdict, it was found that the lessee wishing to assign the property entered into a compact with a person to whom it was to be assigned, and because he could not do that *per directum*, he gave a warrant of attorney which would enable the other to take it in execution. When that second verdict came to be considered, the Court of Queen's Bench held that that entirely varied the case, and under those circumstances the warrant of attorney was held to be a breach of the covenant or restriction not to assign, and judgment was given accordingly.

Now, applying that principle to the present case, in advising your Lordships, I am required to say whether there is upon the face of this special case any thing which ought to satisfy your Lordships that the giving of this warrant of attorney was a contrivance by Mr. Lumley to affect an assignment, which he could not affect directly. Being so called upon, I say that I think there is nothing to warrant any such conclusion. In the first place, although it is stated that it was known to the creditor, Mr. Hughes, that Mr. Lumley was the lessee of the Opera House, I do not find it anywhere distinctly stated that that was the moving cause on his part; but it would be necessary to show, not merely that it was the moving cause on his part, but that it was known to Lumley that he had not the power to assign, and that he gave this warrant of attorney for the purpose of enabling him to do that which he could not do according to the terms of his lease; I think, when we look * at what occurred afterwards, it is perfectly *741 clear that that was not the meaning of the parties, and that, in point of fact, no proceedings have ever been adopted in order to get possession of the Opera House. The warrants of attorney remain just as they were, the property of Mr. Hughes; whether they have been paid or not is not stated. It does not appear that the Opera House was at all transferred from the one party to the other; it remains just as it was; and therefore upon this point I am inclined most strongly to advise your Lordships to concur in the opinions, not unanimous, but the opinions of seven out of the nine of the learned Judges who heard the case, and I accordingly move that your Lordships should give judgment for the defendants in error.

LORD WENSLEYDALE. — My Lords, I have no difficulty in con-

curring in the advice which has just been given by my noble and learned friend ; and I have very little to add to the reasons which he has given for that advice. [His Lordship stated the facts of the case.]

There is no necessity for me, in the view that I take of this case, to offer any opinion upon any question of fact. The points for your Lordships' decision are entirely questions of law. There are three covenants contained in the lease which are alleged to have been broken. Upon the first covenant, that which relates to the improvement of the house for theatrical exhibitions, and the breach of which is alleged to be the not opening of the house in the year 1853, it is quite out of the question to say that that covenant has been broken.

As to the next covenant, it appears to me that Lumley did not grant any lease for a longer term than one year or season.

* 742 He granted a term *e futuro* ; and the Court of Queen's Bench, the Court of Exchequer Chamber, and all the learned Judges, in the opinions they have given to us, are unanimous that there was no breach of that covenant. In that I entirely agree.

The third covenant raises a more important question. The breach alleged of that covenant was, that Lumley did grant an encumbrance by giving a warrant of attorney to enter up judgment ; that by virtue of that warrant of attorney judgment was entered up ; whereby, as it is said, he committed a breach of the covenant by charging the theatre. The Court of Queen's Bench in the unanimous opinion which was delivered by Lord Campbell, held that that was a breach of the covenant to encumber ; that every man must be considered as contemplating the result of his acts ; that if Lumley gave a warrant of attorney, and the effect of that warrant of attorney was, under the recent Act of Parliament (the 1 & 2 Vict., c. 110), that upon that the property would be charged exactly in the same way as if he had himself given an equitable charge upon it, he must be considered to have contemplated that result, and that, therefore, it was a breach of that covenant. That was the opinion which the Court of Queen's Bench expressed upon it.

On the writ of error to the Court of Exchequer Chamber, that Court formed a different conclusion. The Judges there were unanimously of opinion that there was not a charging within the

terms of this covenant; and I agree entirely in the view which they took, because if we look at the terms of the covenant, it is not a covenant that he will do nothing whereby the estate may be encumbered, but it is a covenant that he will not "charge or encumber the theatre or the term hereby granted by mortgaging the same"; that is a direct charge; "or by granting any rent charges"; that is also a direct charge; or by granting "any other encumbrance or encumbrances whatsoever." That * clearly means the same as the former words of the same * 743 nature, that he will not grant any direct charge or encumbrance. If the terms of the covenant were that he would do no act whereby the property should become encumbered, then there is no doubt that he would be guilty of a breach of the covenant by giving a warrant of attorney, which by the operation of the 1 & 2 Vict., c. 110, might cause an encumbrance upon the theatre. The argument *noscitur a sociis* applies here, and it is perfectly clear that all that the parties meant to do was to guard against the direct encumbrance upon the theatre.

In that opinion almost all the Judges concur. Very good reasons have been assigned by Mr. Baron Watson, Mr. Baron Bramwell, and Mr. Justice Williams, which are pretty much to the same effect as I have stated, for construing that covenant to be preventive of a direct charge. It is very true that Mr. Justice Crompton, for whose opinions I have the greatest respect, and Mr. Justice Erle, have taken a different view. They have adhered to the opinion that they expressed in the Court of Queen's Bench; Mr. Justice Coleridge has altered his opinion, and concurs with the great majority of the Judges in thinking that this covenant has not been broken.

That disposes of this question. If there has been no breach of the covenant, it is quite unnecessary to consider the other part of the case. One argument was, that although by the terms of the lease the right of re-entry is reserved, that did not apply to a breach of this covenant. It is unnecessary to say any thing more upon that. I am clearly of opinion that it does apply to every breach of this covenant, as well to this as to every other breach of covenant, and in that opinion all the Judges who have been consulted upon the subject concur.

With respect to the question upon which there was a * division of opinion among the Judges, Mr. Justice Crompton * 744

ton thinking one way and the rest of the Judges another, that if there had been a breach of covenant it was waived by what took place between Mr. Lyon, the solicitor for the defendant, and Mr. Martelli, the agent for the plaintiff, it is quite unnecessary for the decision of this case to give any opinion upon it. I will only state, that I do not wish the opinion of those Judges who thought the breach was waived to go forth with my apparent sanction. I certainly have very considerable doubt whether they are right in coming to that conclusion. It depends upon the construction that is to be put upon what took place between Mr. Martelli and Mr. Barnes, whether it was really the giving of a sum of money and the receipt of that money as rent. The Judges below and those who have given an opinion to your Lordships, thought that the rule of *solutio accipitur in modo solventio* would give a key to the answer. But I cannot myself say that I feel quite satisfied as to such rule being properly applicable to this case. Looking at all that took place between Mr. Martelli and Mr. Barnes, I think it is a question whether the transaction amounted to a payment and receipt of money in satisfaction of rent; certainly the conduct of both parties leads me to suppose that such cannot be regarded as being the real result of the whole transaction, as Mr. Barnes did not re-demand the money when Mr. Martelli declared he would take it only as compensation. That, however, is a question of fact, not of law. I doubt whether I should come to the same conclusion; but it is totally unnecessary to the decision of this case; I only advert to it that it may not be supposed that the above-quoted rule of law is to be considered as applicable to the present case; that rule is, that if a person has two debts, and money is paid by him, the creditor is bound to apply it to that particular debt to which

* 745 the *person paying the money chooses to apply it. I am much disposed to agree with Mr. Justice Crompton in his observation as to the application of the rule to this case. But it is, as I observed, quite unnecessary for the decision of this case, because I entirely concur with my noble and learned friend, and with the great majority of the learned Judges (all, indeed, except two), that looking at the particular terms of this covenant, what is aimed at is the prevention of direct encumbrances, and not indirect encumbrances. This is not to be considered as a direct encumbrance. If it could have been shown, as was done in the second case of *Doe d. Richardson v. Carter*, that the parties sought

really to evade the terms of the covenant, that they really meant to charge this particular lease by virtue of the warrant of attorney, then I think that might be equal to an actual charging, because this might be regarded as merely the machinery used for the purpose of carrying the intention of the parties into effect. But there is no pretence for saying, upon the evidence disclosed in the special case, that there was any thing of that nature. It appears to be quite otherwise. Nothing was intended but to give a warrant of attorney, and although that warrant of attorney was intended to be acted upon, yet it does not appear that the parties meant to use it as a means of charging the theatre. Therefore I agree entirely in the opinion of my noble and learned friend that the judgment of the Court below should be affirmed.

LORD CRANWORTH. — I wish to add to what I said before, that I desire to have it understood that I give no opinion at all to your Lordships as to the waiver. It is a matter upon which I wish to guard myself, because I have not very attentively looked * into that part of the case, which, in my view of the case, * 746 it became unnecessary to do.

LORD WENSLEYDALE.—What I stated upon this subject was to guard against the supposition that I entirely concurred in the argument used by the learned Judges who thought that there was a waiver. It seems to be a matter of fact, rather than a matter of law ; and I am not quite sure that I should have come to the conclusion that the money was received as rent, or that that was the effect that ought to be ultimately ascribed to the transaction.

Judgment for the defendant in error, with costs.

Lords' Journals, 17th April, 1858.

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to the several voters, whether they were paid really and *bond fide* for travelling expenses, and travelling expenses only, or whether they were paid to induce them to give their votes." It is true that, in *Bayntun v. Cattle*,¹ Mr. Baron Alderson said: "If, indeed, the voters had only been paid their actual expenses, there exists a difference of opinion as to the legality of such expenses; others, and probably the majority, think them not legal, for if allowed they would lead to great frauds." That expression threw a doubt upon the opinion of Lord Chief Justice Tindal, but it was not warranted by the decisions of committees. The second section of the statute must, in order fully to comprehend its meaning, be divided into several parts; it begins by stating the persons who may be guilty of bribery; they are persons who "give or lend," and so on, money or valuable consideration to a voter to induce him to vote. But there is no word which expresses that to pay a man money which is owing to him is an offence. A gift must comprehend every description of money not *bond fide* earned or previously expended. To "give" applies to a voluntary donation; a man does not "give" money to any person to whom he owes it. Such

* 755 person has a legal * right to claim it, and the satisfaction of that claim is a lawful payment of a lawful demand. It was so here: the proviso expressly exempts "legal expenses *bond fide* incurred." The travelling expenses were in themselves legal; they were *bond fide* incurred to enable the voter to come to the poll, and it is not even pretended that any gratuity or bribe accompanied the payment of them. As to the second part of the section, the *corpus delicti* must consist of a combination of two things, an agreement to give the voter money to induce him to vote, and corruptly giving him such money after he had voted. A gift made from kindness or charity after the vote was given, and not being made in performance of a previous promise or agreement entered into as an inducement to the voter to vote, cannot be said to bear the character of corruption about it. Now in order for the gift to come within the second part of the section, it is essential that it should be corruptly made. No such character can be given to it here. These were clearly "legal expenses *bond fide* incurred"; they might therefore lawfully be paid, and a previous agreement to pay them would not make the payment corrupt. A man may not only repay, but he may enter into an

¹ 1 Moody & R. 265.

anticipatory contract to repay expenses which are in themselves legal and which must be incurred. Travelling expenses are of this sort; they were not unlawful within the previous statute: *Huntingtower v. Gardiner*.¹ Many committees have sanctioned expenses such as these; the Legislature must have known that fact, and if it intended to prohibit them, would have done so in express terms. The proviso expressly exempts legal expenses from the prohibitory words of the section, and every part of any enactment must have due effect given to it. This was a promise to pay legal expenses; such a promise is not within the statute and the performance of it cannot be corrupt. * [LORD * 756 BROUGHAM. — Then you argue that whether the promise to pay the travelling expenses was absolute or conditional, made no difference.] None at all. [LORD BROUGHAM. — Travelling expenses being legal, the promise might legally be made thus, “You shall have your legal expenses if you vote for A,” which is a negative pregnant amounting to “that you shall not have your legal expenses if you do not vote for A.”] That does not affect the argument. [LORD BROUGHAM. — Or suppose a bill was due to an innkeeper and the candidate said, “If you will vote for A., your bill shall be paid,” would not that be an inducement to him to vote for A., and be within the statute?] The payment of a bill to an innkeeper gives him a profit; but a mere repayment of money out of pocket is not profit. There is nothing in the statute which says that a promise to a voter to pay his travelling expenses conditionally on his coming and voting for the promisor is an illegal thing. That is not expressly created an offence. There is no warranty for so laying down a proposition of criminal law as to assume a criminality where the law has not clearly declared it.

This is not necessarily an engagement to pay money to the voter at all; the expenses of the voter might be paid in a different way. The words of the letter, no doubt, are “will be paid”; but the travelling expenses might be paid by an arrangement with a carriage master, or in some manner of that kind. Such a payment is not therefore necessarily within the words of the Act. It is not true that no claim could be set up on this letter, except when the voter had voted for the defendant. Suppose on the receipt of it Carter had come to Cambridge, but half an hour before his arrival the poll, from some cause which he could not prevent, had

¹ 1 B. & C. 297.

been closed, he would still have been entitled to his legal expenses. He might, therefore, have recovered them without alleging or proving the giving of his vote to the defendant.

* 757 * In *Huntingtower v. Gardiner*¹ the voter had received money after the election at which he had voted for a particular candidate, but there was no agreement for that before the election, and it was held that that was no offence. Mr. Justice Bayley in giving judgment said: "In construing remedial statutes we are not tied down to the letter of the enactment, but effect must not be given to a penal statute unless the offence charged comes within the very words of it." Unless, therefore, the House is satisfied that there was here an agreement to give money to induce the elector to vote for a particular candidate, and that the money was afterwards paid in consequence of that agreement, no offence has been committed under the statute, and judgment must be given for the defendant.

Then as to the question of authority, the printed letter was complete before the written addition was made to it. If the additional writing converted it into an illegal act, the defendant had nothing to do with that. The words were added by a clerk. There was no evidence to show that the defendant ever saw these words or knew that they had been written. In *Allen v. Hearn*,² it was held that a wager as to the result of an election made by voters before the poll began was illegal, because it would necessarily influence their votes; and it is against the policy of the law to permit such wagers, but it is not against the policy of the law that a voter's *bond fide* travelling expenses should be repaid him. The law allows a voter who by labour has earned money as a solicitor or an agent to be paid. Surely it cannot be said that bribery has not been committed in his case, and yet that a man who merely receives back money which he has *bond fide* expended has been bribed.

* 758 * *Sir F. Kelly*, in reply. — There can be no doubt that a promise of this kind will influence the mind and conduct of a voter, and therefore the law has prohibited it.

As to the authority of the defendant, the words were added to the letter by an agent after the defendant's opinion had been openly asked and deliberately given, and they were in exact accord-

¹ 1 B. & C. 297.

² 1 T. R. 56.

ance with that opinion. It makes no difference in the case whether the opinion was honestly entertained or not; if it was erroneous he became responsible for it.

There was therefore evidence for the jury.

THE LORD CHANCELLOR moved that the following questions should be put to the Judges:—

1. Whether, assuming the letter of the 12th of August, 1854, to have been written and sent to Carter by the direction and authority of the defendant in error, there was any evidence for the jury that the defendant was guilty of bribery within the true intent and meaning of the second section of 17 & 18 Vict. c. 102?

2. Whether there was any evidence for the jury that the letter in question was written and sent by the direction or authority of the defendant in error?

3. Whether there was evidence that the defendant corruptly paid money to Carter on account of his having voted at the election?

Agreed to.

1858. February 15.

MR. BARON CHANNELL. — My Lords, it is not without considerable diffidence and distrust as to the correctness of my own opinion that I venture in this case to dissent from the judgment of the Court of Exchequer Chamber. Whatever difficulty there * may be in drawing the proper inference from the * 759 facts of the case, there is no doubt as to the facts themselves. They are few in number, and are stated in the bill of exceptions tendered to the ruling of the learned Judge who tried the cause. The question is, was there any evidence proper to be submitted to the jury in support of the 7th and 8th counts of the declaration? If there was any evidence proper to be submitted to the jury, the jurors must be taken to have exercised their discretion and judgment upon the matter, the verdict at *Nisi Prius* must then stand, and the judgment of the Court of Exchequer Chamber be reversed. I am of opinion that there was such evidence.

It is in my opinion unnecessary to consider whether, prior to the Act of the 17 & 18 Vict. c. 102, the *bond fide* payment of mere travelling expenses was illegal. Nor is it, in the view that I take of this case, necessary to decide whether, since the Act, a promise to pay travelling expenses is void within that statute, if

unaccompanied by a condition that the person to be paid is to vote for the party promising to pay.

I concur with the Court of Exchequer Chamber in thinking that a promise to pay a voter his travelling expenses on condition that he votes for the party promising to pay is an offence within the Act. Was the letter set out in the bill of exceptions such a promise? I think it was. The writer did, by that letter, promise to pay the voter's travelling expenses. The plain meaning of the letter is this: "Come and vote for the defendant, and then your railway expenses shall be paid." I am unable to find room for any doubt that this was the meaning of the particular promise, for some promise there undoubtedly was. Assume that a promise to pay a voter his travelling expenses was legal; that no Act *760 of Parliament *had, in direct terms, or in language which might be contended to have that effect, invalidated such a promise; assume a promise such as that stated in this letter, I inquire, could an action have been maintained on the promise by the promisee if he had not voted at all, or had voted against the defendant? It is, to my mind, impossible to come to such a conclusion; but such is, I think, the necessary conclusion, if, there being some promise to pay, that promise is to be considered an absolute and unconditional promise to pay the travelling expenses of the elector coming to the town, regardless of the question whether or how the elector voted. Then, did the defendant authorise the writing and sending such a letter? The defendant acted, I have no doubt, in the honest belief that the payment of mere travelling expenses was legal; he gave no more than well-merited respect to the opinion attributed to the very learned Judge whose opinion he referred to. But the question to my mind as regards the 7th count is not what the defendant may have thought to be legal, but what he did; and whether what he did was an offence against the statute.

But it is said that if the construction of the letter is that which I have assumed, then that the defendant did not authorise such a letter. I think he did. He meant to express his opinion that the travelling expenses of the voter might be paid; he meant, I think, to authorise his agent to pay those expenses. If I am to assume that he gave any authority at all, what ground is there for supposing that he meant it to be an authority to pay expenses without having the contemplated advantage, viz. the vote of the elector in

his favour? I see none. The observations I have made I have intended to apply more particularly to the 7th count. The 8th count may require a somewhat different consideration. It was strongly argued *at your Lordships' bar, that assum- *761 ing the defendant gave, there is no evidence that he gave corruptly.

First, did he give? In my view he authorised his agent to pay. The agent paid; the agent gave; the agent paid to a voter who had voted for the defendant, with the knowledge that he had so voted, and, as I think it must be taken, with the knowledge of an antecedent promise that the elector so voting was to be paid his travelling expenses. That, in my opinion, was evidence proper to be submitted to the jury upon the 8th count.

In a moral point of view there may have been nothing corrupt in the conduct of the defendant, acting on the belief that I think he did. But the defendant's conduct would have been corrupt within the meaning of the statute if the defendant had himself promised contrary to the statute, and had himself paid in fulfilment of his promise, after obtaining an advantage which the statute means he should not obtain. That would, I think, have been an offence within the meaning of the statute. The defendant did not do all these acts himself, but there was evidence that he did so by an agent or agents whom he authorised, so as to raise a case proper to be submitted to the jury.

I answer your Lordships' first question by saying that, assuming the letter of the 12th of August, 1854, to have been written and sent to Carter by the direction and authority of the defendant in error, there was evidence for the jury that the defendant was guilty of bribery within the true intent and meaning of the 2d section of 17 & 18 Vict. c. 102.

To your Lordships' second question, I answer that there was evidence for the jury that the letter in question was written and sent by the direction or authority of the defendant in error.

* To the third, that there was evidence that the defend- *762 ant corruptly paid money to Carter on account of his having voted at the election.

MR. BARON WATSON. — My Lords, in answer to the first question proposed to the Judges by your Lordships, I am of opinion that, assuming the letter of the 12th of August, 1854, to have been

written and sent to Carter by the direction and authority of the defendant in error, there was evidence for the jury that the defendant was guilty of bribery within the true intent and meaning of the second section of 17 & 18 Vict. c. 102. That enactment is— [his Lordship read it]. It is not necessary that the voter should vote, or even promise to vote, to constitute an act of bribery under that provision. It has been suggested that to bring a promise within this provision it must be a conditional promise to pay the travelling expenses if the elector should vote for the promiser. It appears to me that it would be equally within the meaning of the Act if the promise was unconditional, simply to pay money on the elector voting at all, inasmuch as the candidate may have a full reliance (perhaps erroneously) how the vote would be given, and that such promise would be an inducement to vote whether conditional or unconditional. Be that as it may, the letter in this case requesting the voter to vote for Lord Maidstone and Mr. Slade, and adding a postscript, "Your railway expenses will be paid," is evidence of an offer of money in order to induce him to vote on either construction of the statute. With respect to the proviso at the end of the section, it was argued at the bar, that the

payment of *bonâ fide* travelling expenses is legal; this requires examination. No doubt, * according to the interpretation put on the 2 Geo. 2, c. 24, § 7, in the case of *Lord Huntingtower v. Gardiner*,¹ the payment of travelling expenses, or indeed any other sum of money, after the election, to a voter for having voted, without any promise to that effect before voting, is legal under that Act; whether a promise to pay travelling expenses to an elector, in order that he might vote for a particular candidate, was legal under the law as it then stood, is not by any means determined thereby; certainly there is no such decision to that effect in the Courts of law.

The only two cases at law are, first, *Bayntun v. Cattle*,² where Baron Alderson, upon a question whether the defendant had authorised certain payments made by the plaintiff for travelling expenses, in summing up to the jury, observes: "A difference has existed as to the legality of such payments (i. e. travelling expenses), some committees of the House of Commons having held that such payments are legal; others (and probably this is the more correct opinion), that such payments are not legal."

¹ 1 B. & C. 297.

² 1 Moody & R. 265.

In the second case, *Bremridge v. Campbell*,¹ before Chief Justice Tindal, the plaintiffs sought to recover moneys, amongst other large sums, as and for the travelling expenses of voters paid by him on account of the defendant whilst a candidate for the borough of Barnstaple. The objection taken there was that the sums charged were not *bond fide* travelling expenses, but evidently given as bribes, and Chief Justice Tindal, in answer to such objection, says: "I shall leave it to the jury to say whether they believed that the money was given *bond fide* for expenses or not. Each voter from the same place receives the same sum."

It is certainly clear that neither of these learned Judges expressed any opinion that a payment, or an offer, or a *promise to pay travelling expenses before the election, * 764 to induce an elector to vote, was not bribery under the then existing law.

A candidate at an election for Members of Parliament is under no obligation, legal or moral, to pay the necessary travelling expenses of voters, any more than for the loss of the voter's time. The voter is called on to exercise his franchise for the public benefit, and a promise to pay would appear to be without consideration, not a *bond fide* debt, or any debt at all. Indeed, I am of opinion that such promise is illegal, according to the principle laid down by Lord Mansfield, *Allen v. Hearn*,² where that learned Judge says: "That one of the principal foundations of the constitution depends on the exercise of the franchise; that the election of Members of Parliament should be free, and particularly that every voter should be free from pecuniary influence." Whatever doubts formerly existed, the last act was passed because "the laws to prevent corrupt practices have been found insufficient"; and it makes any promise to pay money to induce an elector to vote an act of bribery, and this, no doubt, to prevent money payments to voters at all, more especially as they had been a colour and a pretence for wholesale bribery.

The proviso at the end of section 2 refers no doubt to the various legal expenses incurred at elections, such as printing, messengers, hire of committee rooms, tavern expenses, and expenses of that nature; and to exempt cases where a candidate had paid such sums, or agreed to pay them, before the election to keep the voter in good humour, or, in other words, to induce him to vote.

¹ 5 Car. & P. 186.

² 1 T. R. 59.

In answer to the second question, I am of opinion that there was evidence for the jury that the letter in question was *765 written and sent by the authority of the defendant in *error.

It seems that the circular, with the postscript, issued from the defendant's committee at Cambridge, and that at the committee-room, for the guidance of the committee, and of Peed in particular, the defendant said that the travelling expenses might be paid, in answer to a question, "whether it would be legal to get up the out-voters and pay their legal travelling expenses which they paid out of pocket"; and Thirkettle wrote these words at the bottom of the letter, "Your railway expenses will be paid," after the defendant said that the payment of travelling expenses was legal. It seems to me impossible to withhold such evidence from the jury, when the defendant gave an opinion for the guidance of the committee-men, they should bring up the out-voters.

To the third question, I am of opinion that there was evidence that the defendant corruptly paid money to Carter on account of his having voted at the election; as it appears to me, there was evidence of a promise amounting to bribery on the part of the defendant, and so found by the jury, the payment in pursuance thereof falls within the meaning of the word "corruptly" in the statute.

MR. BARON BRAMWELL. — In answer to your Lordships' question in this case, I beg to refer to the judgment of the majority of the Court of Exchequer, which included Mr. Baron Alderson, Mr. Justice Cresswell, Mr. Justice Crowder, Mr. Baron Martin, and myself, and by which, with one exception, I abide. In that judgment it is said, "It will be seen we attach no weight to the proviso at the end of section 2 of Statute 17 & 18 Vict. c. 102." I incline to think that is wrong, and that the reasons given for the opinion are not sufficient. The difficulty, with all respect, is the fault of the Legislature. (See Clerk's Election Law, p. 82.) The statute *766 *prohibits, and so makes certain acts illegal, and then excepts "legal" expenses. Necessarily, every thing legal is excepted from or not within what is illegal, and the section, therefore, is open to the criticism on it in that part of the judgment I refer to. But it is not right to hold any part of an enactment nugatory or needless, if a meaning and purpose can be given

to it. This was powerfully pressed by the Attorney-General in his argument before your Lordships, and I think that argument should prevail, in part at least. The whole provision may well read thus : " Every person who shall promise, &c. money, &c. in order to induce any voter to vote, shall be guilty of bribery, provided that this enactment shall not extend to any money paid or agreed to be paid for or on account of any expenses *bond fide* incurred at or concerning any election ; and provided such expenses are not illegal on "some other ground than this prohibition." There may be such cases. For instance, the expenses of committee rooms and advertisements are not unlawful, and are not so, though incurred with a particular person to induce him to vote. This is the meaning given to this proviso by the defendant's counsel below.

Still it remains to consider whether travelling expenses are expenses incurred at or concerning an election, and are not otherwise illegal than as being within the terms of the general prohibition in section 2. Now, I think they are not otherwise illegal ; they are not in terms prohibited by this the only statute on the subject, nor were they, I think, within any definition of bribery at common law. But then are they expenses incurred at or concerning an election ? I think not. I think that means the necessary expenses of an election ; those expenses that are incurred and would be incurred whether the candidate did or did not wish to induce any particular voter to vote. I still think, therefore, * this provision does not help the defendant, and I *767 think the judgment wrong only in saying that the proviso is nugatory, as I think it has a meaning, viz. that above mentioned.

But as I have said, I abide by the other part of the judgment. I am of opinion the letter is not evidence of a promise to pay the expenses conditional on Carter's voting, and that if it is, there is no evidence that the defendant authorised it. I do not, as a fact, believe that the voting was made a condition of the payment. I doubt not that had Carter come, and it had been found that he had not a vote, or came too late to give it, or by some other accident was prevented voting, he would still have been paid. No doubt there was an expectation that he would vote for the defendant, but an expectation is very different from an engagement or condition. No doubt, also, he would not have been paid had he

voted for the opposite candidate, but the penalty is sued for, not for offering money to induce him not to vote, but to vote, and indeed it was not offered to induce him not to vote. It ought not to be implied that a document means a particular thing, unless the contrary would be repugnant to it. Here, it is said, the document implies, "If you will vote for Lord Maidstone and Mr. Slade," but would there be any repugnancy had it run thus:— "You are requested to return and vote for Lord Maidstone and Mr. Slade; your railway expenses will be paid if you come in pursuance of this request, whether you vote or not." I think not. It is also to be remembered that one construction makes the document innocent, the other makes it guilty.

If the letter is evidence of a conditional, and consequently, as I think, of an illegal promise, I cannot see what evidence there is that the defendant authorised it. He did not do so in terms, and

all he did from which authority is inferred was to say it is
*768 legal to pay travelling expenses. *In that opinion I agree,

and I cannot, therefore, see how it gives authority to make an unlawful promise, nor do I believe, for the reasons I have given, that a candidate would be likely to make a conditional promise. I presume candidates have a well-grounded expectation that voters in their interest will vote for them if they come, or if not, that they will not ask their expenses. I do not understand that this point was taken at *Nisi Prius*, though the form of the exception comprehends it. I do not understand, therefore, that an opinion was expressed on it there, so that I approach the consideration of this question without feeling that the ruling there is an authority against this opinion. And I think, with all respect, that those opinions now entertained to the effect that the promise was conditional, and that there was authority so to make it, are based on the supposed improbability of a candidate undertaking to pay the travelling expenses of a person who should not vote for him. This view I think a mistake, and that it confounds an expectation with a condition. I therefore answer all your Lordships' questions in the negative.

MR. JUSTICE WILLES. — My Lords, I am of opinion that, assuming the letter of the 12th of August, 1854, to have been written and sent to Carter by the direction and authority of the defendant in error, there was evidence for the jury that the defendant was

guilty of bribery within the true intent and meaning of the 2d section of 17 & 18 Vict., c. 102.

The bare reading of the letter, coupled with the circumstances under which it was written, satisfies my mind beyond a doubt that it was, and was intended to be understood as, a promise to pay the railway expenses of the voter, if he voted for the named candidates. The expenses were not to be paid for doing nothing. Then for doing * what were they to be paid? Of *769 course, for doing what was asked, namely, returning to Cambridge and voting for the named candidates. There is nothing to limit the condition to returning to Cambridge merely. Either, therefore, the consideration for payment of the travelling expenses was the voter returning to Cambridge and voting, or at least doing his best to vote, for the named candidates; or the voter's expenses were to be paid though he did nothing or did the contrary. But the latter construction was not likely to suggest itself to the mind of the voter; and it savours, to my apprehension, of that excessive subtlety which is reprobated and disallowed of in law.

The question, therefore, is, in effect, whether a promise to a voter of his travelling expenses, conditionally on his voting for the candidate who makes the promise, is bribery within the 2d section of the statute. I am of opinion that it is.

That section, which is subject to a proviso, describes the persons who shall be deemed guilty of bribery under several heads. The first of those heads is as follows [his Lordship read it].

Now, it is clear that a promise of "travelling expenses" is a promise of "money," and so within the words of the Act, which must therefore be construed as including it, unless to do so would lead to some manifest absurdity or incongruity with the rest of the statute, showing that such could not have been the intention of the Legislature. I see no such absurdity or incongruity, but the contrary. A voter who will obtain his travelling expenses if he shall vote for A., but not if he shall vote for B., has, when at the polling place, a direct pecuniary inducement to vote for A.; and a person who promises to pay expenses upon such a condition creates that inducement. If it be said that this may and practically will be counterbalanced by B.'s making * a similar promise, I *770 answer that B. is not bound to do so — may not be able, or if able, willing to bear the expense — and if not, the longer purse or greater profuseness of A. may prevail. Besides, bribery is not

the less bribery because each candidate offers the same sum to those who vote for him. Moreover, if the payment of travelling expenses were allowed, there would be danger of such allowance being made a cloak for bribery. There is no reason why, if a man is to be repaid his disbursements because he has expended money, he should not also be remunerated for the inconvenience and loss of time he sustains in coming to the poll. But what a door this, if allowed, would open to abuse! Whatever be the better opinion upon the justice of such payments as between the candidate and the voter, it may well have been the intention of the Legislature to forbid them, as being very likely to engender corrupt practices, the more dangerous because of their being plausible. I cannot find anything in the statute inconsistent with such an intention.

As to the proviso at the end of the second section, in my opinion it obviously refers to the expenses of the candidate, not those of the voters, and so is inapplicable to the present question. Therefore, construing the Act according to its express terms, and "so as to suppress the mischief and advance the remedy," I answer the first and most important question in the affirmative.

As to the second question, I am of opinion that there was evidence for the jury that the letter in question was written and sent by the direction and authority of the defendant in error. That letter was sent from the committee room of the defendant, and with the exception of the words, "Your railway expenses will be paid," it was a printed circular requesting votes. Those words were added in writing by Thirkettle, the clerk of Peed, who was

*771 the *agent of the defendant for election expenses. No sound distinction can be made upon the facts between Thirkettle and Peed. The evidence is clear that Peed sanctioned what his clerk did; and the true question is, whether what passed between the defendant and Peed upon the subject of travelling expenses authorised the latter to add to the circular words promising payment of railway expenses conditionally upon the voters giving their votes on his side. The evidence upon that point is in substance this: There was a joint committee for conducting the election of Lord Maidstone and the defendant. The question of travelling expenses was discussed in the committee room in the defendant's presence. In the course of that discussion the defendant (after referring to an opinion of Chief Justice Tindal, according to which, if applicable to the existing statute, travelling

expenses might legally be paid to induce the voter to vote, and speaking for the guidance of Peed, and in answer to a question put by him) said, that it was legal to pay travelling expenses "to bring up out-voters." That was not an abstract proposition of law, but a statement intended to be acted upon for the purposes of the election. It necessarily implied an authority to inform the out-voters that their railway expenses would be paid if they came up, because otherwise the payment could not operate "to bring them up." Well, then, what did the defendant mean by "bring up"? Was it merely to induce the voters to come to the place of polling and not to vote at all, or come there and vote for the rival candidates? These suppositions are possible, but (I speak mildly) improbable in a high degree, because plainly inconsistent with the object for which the defendant was striving, namely, to get votes for his side. There only remains one other construction of "bring up," namely, induce to come to the poll and vote in favour of the particular candidate. If this, the only probable * view, * 772 be adopted, there was authority to communicate it to the voter, which is all that the letter in question does. That the defendant authorised Peed to communicate to the voters in some form, in order to "bring them up," that their railway expenses would be paid, in some sense, is certain. It was improbable, under the circumstances, that the candidate should intend to pay the expenses of persons who voted against him, or not at all, and at least, therefore, it was for the jurors to say whether, in their judgment, the more probable and rational view of the case, and that acted upon by the defendant's agent in the matter, was not the true one, namely, that the candidate intended the out-voters to be informed that they would be paid their railway expenses conditionally if they voted on his side.

As a difference of opinion exists upon this question, I may be excused for referring to an authority in support of the elementary proposition that in civil cases the preponderance of probability may constitute sufficient ground for a verdict. I find such an authority referred to in Mr. Best's very able and instructive treatise on the Principles of Evidence.¹ So long since as the 14th of Elizabeth, Chief Justice Dyer and a majority of the other Justices of the Common Pleas laid down this distinction between pleadings and evidence, "that in a writ or declaration or other pleading certainty

¹ 2 ed. p. 114.

ought to be shown, for there the party must answer to it, and the Court must adjudge upon it; and that which the party shall be compelled to answer to, and which is the foundation whereupon the Court is to give judgment, ought to be certain, or else the party would be driven to answer to what he does not know, and the Court to give judgment upon that which is utterly uncertain.

But where the matter is so far gone that the parties are at
 * 773 issue, or that the inquest is awarded by default, so * that the jury is to give a verdict one way or the other, there, if the matter is doubtful, they may found their verdict upon that which appears the most probable, and by the same reason that which is most probable shall be good evidence." *Newis v. Lark*.¹ For these reasons I answer the second question in the affirmative.

In answer to the third question, I am of opinion that there was evidence that the defendant corruptly paid money to Carter on account of his having voted at the election. I think the word "corruptly" in this statute means not "dishonestly," but in purposely doing an act which the law forbids as tending to corrupt voters, whether it be to give a pecuniary inducement to vote, or a reward for having voted in any particular manner. Both the giver and the receiver in such a case may be said to act "corruptly." The word "corruptly" seems to be used as a designation of the act of rewarding a man for having voted in a particular way as being corrupt, rather than as part of the definition of the offence. I agree with what was said by the learned Judge at the trial, that if the moving cause of giving the money is the voter having voted for the particular candidate, such gift is contrary to the statute, as being given by way of reward for the vote, and therefore corrupt. This may exclude cases in which money is given from purely charitable motives, though to a voter; but in the present case no other probable motive besides the vote upon the defendant's side itself appears or can be suggested.

The third question in this case may upon the special facts also be disposed of upon narrower grounds, as follows: A promise forbidden by law as tending to corruption having been made by the defendant's agent, to pay money to Carter if he would vote
 * 774 as he did vote, such * money, when subsequently paid to him by the defendant's agent accordingly, was paid in pur-

¹ Plowd. 412.

suance of a forbidden promise, the only consideration for which was a vote influenced thereby, and therefore, in the sense already explained, it was paid "corruptly." And if the answer to the second question is right, that there was evidence of authority to write the letter, there was, of course, evidence of authority to make the payment promised therein.

I thus answer all the questions in the affirmative.

MR. JUSTICE CROMPTON. — My Lords, I think that assuming the letter in question to have been written and sent by the direction of the defendant in error, there was evidence of bribery within the meaning of the late statute. That letter, under the circumstances stated in the Bill of Exceptions, seems to me to amount to a promise that the railway expenses should be paid to the voter if he voted for the candidates named in the letter. He is requested to come to Cambridge, and to vote for the specified candidates, and told that his railway expenses will be paid. And I do not think it consistent with any fair and reasonable construction to suppose that any man could understand that his railway expenses were to be paid whichever way he voted. Neither do I think that the offer could mean, as suggested, that conveyances would be secured by railway, or that the letter referred to prepayment of the railway fares by the candidates, leaving the voter to vote as he pleased. No arrangement appears to have been made for providing railway carriages by the candidates, and the arrangement acted upon was, that the voter should pay for himself and afterwards receive back the money; and the expression in the letter seems to me to refer to a repayment of the expenses incurred by the voter.

* It was urged in argument that the money could not be * 775 a gift within the statute, because, as it was said, there was a consideration for the repayment by reason of the payment or expense incurred by the voter, being at the request of the party making the promise, and subsequently paying; and it was contended that a payment of a sum of money due for a valuable consideration would not be within the statute. This doctrine would, however, as it seems to me, go much further than could possibly be supported. It would, for instance, include a payment as a remuneration for loss of time, if a voter should, at the request of the candidate, abstain from work that he might come to vote for him. It was said, also, that the voter really gets nothing, and if

he could recover the money as a sum laid down by him for the candidate, at the candidate's request and as the candidate's money, so that the candidate would be liable to repay the amount whichever way the voter voted as money paid by the voter for the use of the candidate at his request, the case would be much the same as if the candidate had provided travelling accommodation for the voter, and it would be necessary to consider how far such providing travelling accommodation would be legal ; but, according to what I think the true construction of the letter, the money was not to be paid by the voter as the agent of the candidate, to be repaid back at all events, but I think the real agreement was, " If you vote for us, we will pay you the money you have expended for travelling expenses, which, in the event of your voting the other way, will fall upon yourself." And this seems within the principle which requires that the voter's mind should be left unbiassed to the last, and is within the enactment of the statute as to the promise of money. Part of the consideration for which the money is to be paid is the voting for the particular candidate, and the promise is, therefore, to give money for so voting. I answer your Lordships' first question, therefore, in the affirmative.

With regard to the second question, I think that there was evidence for the jury that the letter was written and sent by the authority and direction of the defendant. It appears that a discussion took place at the committee as to the question of travelling expenses, and that the defendant gave his opinion for the guidance of the parties who were conducting such matters. The " guidance " must surely mean the guidance with reference to what they were to do as to getting up the out-voters and paying their travelling expenses.

It appears that Peed had asked the defendant whether it would be legal to get up the out-voters and pay their legal travelling expenses, " what they had paid out of pocket," so that it is clear that the conversation and advice had no reference to any plan of providing carriages for out-voters, but that it referred directly to the repayment of out-voters of the money they had paid for their travelling expenses. It seems to me that it is hardly consistent with any reasonable probability to suppose that the out-voters, so to be brought up and repaid, were to be repaid whichever way they voted, or that the conversation had any reference to the bringing

up out-voters who were to vote or might vote for opposing candidates. I think that the circumstances stated to have taken place at the committee room were at all events evidence of the defendant giving his sanction, direction, and authority, that the course which was adopted should be taken, and if so, the payment afterwards seems to have been in conformity with the letter and promise, and to have been the act of the defendant through his agent.

I answer your Lordships' second and third questions, therefore, also in the affirmative.

* Mr. JUSTICE WILLIAMS. — My Lords, I am of opinion * 777 that all the questions put by your Lordships ought to be answered in the affirmative.

As to the first of these questions, the 2d section of the Statute 17 & 18 Vict., c. 102, enacts, that a man shall be deemed guilty of bribery "if he shall promise any money" "to any voter" "in order to induce him to vote."

The letter to which this question adverts appears to contain an implied promise to pay money to the voter, namely, the amount of his railway expenses, if he shall have incurred them by reason of acceding to the request contained in the letter, viz. to "return to Cambridge and record your vote in favour of Lord Maidstone and F. W. Slade, Esq." And with respect to the motive of the promise, I am wholly unable to understand how any doubt can be entertained that the promise was made simply in order to get the voter to come to Cambridge and vote for Lord Maidstone and Mr. Slade; or, in the words of the statute, "in order to induce him" ("any voter") "to vote." As to the proviso in the statute that the enactment shall not extend to any money paid or agreed to be paid for or on account of any legal expenses *bonâ fide* incurred at or concerning any election, I agree with my brother Willes, that it refers to the expenses of the candidate, and not those of the voters, and is quite inapplicable to the present question.

As to the second of your Lordships' questions, I beg to call your attention to that part of the evidence of William Thirkettle, which speaks of the transaction in the committee room of Lord Maidstone and Mr. Slade. The persons present there were Mr. Slade, Mr. Peed, and the witness. Mr. Peed was Mr. Slade's "agent for election * expenses," appointed by him * 778

afterwards in effect makes the payment. But unless the mere payment and the promise to pay in order to procure the vote are the same thing, or unless there be reasonable grounds from the evidence to impute to the defendant that he intended to convey to those present more than he expressed (of which I certainly see none), he, the defendant, clearly has furnished no evidence of authority, directly or indirectly given, to do more than to pay the expenses. Now, in my opinion, this is not the same thing with a promise to pay in order to procure a vote. The one I have already said I consider to be illegal; the other, simply and by itself, I look upon as legal, becoming only illegal when done corruptly. My reasons for this latter opinion will be stated in my answer to your Lordships' third question.

3d. I have already stated my opinion that there was evidence that the defendant paid money to Carter on account of his having voted at the election; and the learned Judge who tried the cause is stated to have been of opinion that this was equivalent to his having paid the money corruptly. According to his view of the statute, the word "corruptly" is purely superfluous and otiose, for he expressly tells the jurors that they ought to find for the plaintiff, if they were satisfied that the money was given by

* 784 * or for the plaintiff, and that the moving cause for the gift was that Carter had voted for the defendant, even though the amount was no more than the fair and reasonable expense incurred, and though the defendant honestly believed he was committing no offence thereby. No one can entertain a more sincere or greater respect for the author of that opinion than I do, nor venture to differ from him with greater diffidence; but after much consideration, I cannot but think that the judgment of the Court below, which is opposed to his ruling at *Nisi Prius*, stands on sounder foundations. The word "corruptly" certainly was not inserted in the statute without a purpose; twice in the section, in branches 1 and 2, it is omitted in the first parts, which relate to promises and agreements to procure future votes; twice it is inserted in the latter parts, where the reference is to votes having been given or withheld at the election past. For the omission in the former and the insertion in the latter many good reasons may be assigned; it is enough to say, that a promise to pay money or to procure a place to induce a voter to vote for a particular candidate, can only be made with a view to influence the voter's mind,

and interfere with the independence of the vote. However laudable the motive in the mind of him who promises, or whatever his knowledge of the law, the act is against the policy of the statute, and within the mischief to be prevented; the statute is, therefore, framed to prevent the act under all circumstances. But to give money or procure place on account of the vote having been given or withheld after the election may or may not be within the mischief which the Act was intended to prevent, or it may be done under circumstances which so remotely tend that way, that the Legislature may well have declined to make it penal under all circumstances. Some such were mentioned in the judgment *in the Court below; others will readily occur to *785 the mind. It appears to me, then, that it is material to bring an act within this part of the section, that it should have been done "corruptly," and that whatever may be required to satisfy that word, the merely doing it because the vote had been given or withheld is not enough. As a general rule, no doubt, the party's knowledge of the law is immaterial, or perhaps is to be conclusively presumed; but here the statute expressly makes the operating motive in the mind of the party material, and it adds that that motive must be corrupt; which is as much as to say, that it may operate honestly and without intent to interfere with the purity of election.

Now, in the present case, nothing is found which affects the defendant, but that he expressed an opinion, founded on that of a great Judge, that such a payment, confined within very strict bounds, might be made. This might not have protected him if evidence of a corrupt motive had been given; but to make it in itself evidence of corruption seems to me against candour and the proper construction of the statute. I think therefore, that this question ought to be answered, like the second, in the negative.

April 17.

LORD CRANWORTH, after fully stating the case, said: The first question to be considered is, whether the payment of the expenses of eight shillings to a voter for coming from Huntingdon to vote for members of Parliament for Cambridge, if that payment was made by or with the authority of the candidates, was or was not bribery within the meaning of the Act of Parliament. If that should be determined in the affirmative, then another question to

be considered is whether there is any proof that this payment, *of which there was undoubted proof that it was made to Carter, was made by the authority of the candidate.

On the first point, I confess that, though undoubtedly from the earliest time of my recollection this has been a matter under discussion, I never have been able to entertain any doubt but that the giving of money to a person to come and vote for a particular candidate at a particular election is giving to him money within the meaning of this section, and within the meaning of previous sections, which are to the same effect as the present. The section is: "That every person who shall directly or indirectly give any money to any voter in order to induce the voter to vote or refrain from voting, shall be guilty of bribery." Now surely, if I say to a person, "If you will come to Cambridge and vote for me, I will give you money, being the amount of whatever expense you may pay for coming there to vote," that is giving money to the voter for the purpose of inducing him to vote, it is giving money to him to indemnify him for something which, but for giving the money, he would have to pay out of his own pocket. It may be a matter for your Lordships, and for the other House of Parliament, in your legislative capacity, to consider whether it would not be reasonable to alter this enactment, and to say that money *bonâ fide* paid, which is no more than an equivalent for the expense of coming to vote, ought not to be considered as a bribe. That, of course, is a matter for the consideration of the Legislature in its legislative capacity. We are deciding now judicially whether money so given does or does not come within the description of money given to a voter to induce him to come and vote at the election. I think that is a matter which admits of no doubt.

Then that being so, the question in the first place is whether there was evidence that this money was given, and *787 *of that, I think, there can be no possible doubt. The evidence was most clear upon that point. That the money was paid nobody doubts. The real question in dispute was, whether there was or was not evidence which could by any possibility be laid before the jurymen as evidence which might induce them to come to the conclusion that that payment of eight shillings was a payment made by the authority of the candidates, Lord Maidstone and Mr. Slade.

Upon that subject the evidence was this — [his Lordship stated it].

The question now is whether, under these circumstances, there was evidence from which the jury might reasonably infer, if not contradicted, that Mr. Slade authorised adding to the letter the words so written.

The question being raised whether there was evidence to go to the jury, I confess, so far from having any doubt whether there was such evidence, my only doubt is as to the possibility of coming to any other conclusion. There are circulars printed by the direction of Mr. Slade to be sent to the out-voters to desire them to come up to vote. A discussion takes place whether it is lawful to pay their expenses. Mr. Slade says, and not only says, but says "for the guidance of" his agent (for that is the evidence), that it is lawful to pay their expenses. Surely, when immediately after that the agent writes at the bottom of the circulars, "Your railway expenses will be paid," the inference is irresistible that that was stated by Mr. Slade for the purpose of being communicated to the out-voters. Indeed if it was legal that expenses should be paid, one cannot but suppose that the candidate as a reasonable man would inform the out-voters that they would be paid, because it would manifestly be an inducement to them to come to vote when probably they otherwise might not come.

Therefore, I confess upon that point the case appears to *788 me perfectly clear, and the only error that there appears to me to be in this case is this: I do not think that there was evidence that warranted a finding upon both counts; and, although I am clearly of opinion that the paying of the money was a corrupt payment within the meaning of the statute, because I cannot give the word "corruptly," as there used, referring to a payment after voting, any other meaning than a payment in violation of that which the statute was passed to prohibit. Although there was evidence of that, I think it clear that the Legislature did not mean that there should be two penalties recovered. If you said: "I will give you eight shillings if you come and vote for me," and on the man coming to vote for you, you gave the eight shillings, it is clear to my mind that in such a case the Legislature meant that to be only one act of bribery; but here the counts are two, although there is only evidence to support one count.

Now the question is, what is the course that ought to be pursued here? I have had some doubt whether that error might not have warranted a *venire de novo*; but upon consideration, I do not think that is so; because the objection which is taken by way of exception, is not pointed to that. The learned Judge is reported to have told the jurors that if they "were satisfied upon the evidence that the defendant did by himself, or any other person on his behalf authorised by him so to do, promise money to the said Richard Carter, in order to induce him to vote for the said defendant, that they ought to find the seventh count for the plaintiff." That was quite a right direction. And also, "that if the jurors were satisfied upon the evidence that the defendant did by himself, or any other person on his behalf authorised by him so to do, give money to the said Richard Carter on account of,

*789. that is to say, that the *moving cause of his giving such money was Carter's having voted for the defendant, that they ought to find the eighth count for the plaintiff." That again is perfectly correct. Both those directions were perfectly right. Therefore the objection that only one penalty can be recovered cannot arise in truth upon this bill of exceptions. I understand, however, that a communication has been made that the plaintiff is willing to enter a *nolle prosequi* upon either one of those counts. And that being so, it appears to me that the judgment below ordering a *venire de novo* was wrong, and ought to be reversed, and that instead of that, judgment should be entered for the plaintiff, but (with his consent)¹ entered upon one count only.

LORD WENSLEYDALE.—In this case I shall have but a few observations to make in addition to those which my noble and learned friend has made. This was an action originally brought for penalties, I think, to the number of fifty, by Mr. Cooper against Mr. Slade, who was a candidate for the borough of Cambridge at the last general election but one. The principal object being to take the opinion of the Court, and if necessary, of the Court of Error, upon the construction of the late Act of Parliament, I thought it was proper, presiding as Judge at the trial, that so many penalties should not be enforced, and the plaintiff abandoned all, except two relating to the same transaction. I had, therefore, to deliver my opinion whether the Act had been

¹ See 15 & 16 Vict. c. 76, § 157.

violated in the one case or the other ; my duty was confined, as I thought, by the consent of the counsel at the trial, simply to giving my opinion as to the construction of the Act of Parliament, which was afterwards to be the subject of review, if necessary, in this supreme tribunal.

* I had no difficulty in giving my opinion as to the construction of the Act ; I thought that, according to the meaning of the Act, a promise of a sum of money, although that money might be only the fair and reasonable expenses of the voter coming to the poll, if made in order to induce any voter to vote, or refrain from voting, was within the Act of Parliament. If payment or repayment of the voter's travelling expenses in this particular case was promised with a condition expressed or implied to vote for a particular candidate, then, in my opinion, it was an offence within the Act of Parliament, although those travelling expenses were perfectly fair and reasonable, and I so delivered my opinion, which, of course, was subject to review. * 790

I also felt it necessary to give an opinion upon the other count on which the plaintiff proceeded, in which it was charged that Mr. Slade had paid money corruptly to the voter on account of his having voted at the last election. I was obliged to put a construction upon that clause of the Act also, and I did so, certainly with some hesitation in my mind, because I confess not exactly to understand the meaning of the term "corruptly," as used in that Act of Parliament ; but feeling certain that the Legislature could not mean to impose two penalties for the same transaction, namely, one for the promise to give money in order to induce a person to vote, and another for afterwards giving the money for having so voted, I thought I was bound to dismiss from my consideration altogether any previous promise that had been made ; that the Act did not refer to payment pursuant to a promise previously made, but to a payment afterwards without any previous promise ; and it occurred to my mind that the reasonable construction to be put upon the Act was, that if a man gave money to a voter as a reward for having voted for him, that being the moving cause of the vote, it must be a corrupt payment within the meaning of the Act of Parliament. But I confess, certainly, not to have been perfectly satisfied with the correctness of that opinion. * 791

With respect to the first proposition that was laid down, that

every payment of expenses, though fair and reasonable, to a voter in order to induce him to vote, that is, every payment upon any condition expressed or implied that he should be paid his expenses if he voted for a particular candidate, is bribery within the meaning of the Act of Parliament, appears to admit of no doubt at all; and there has been no difference of opinion upon it anywhere. The Judges of the Court of Exchequer Chamber were all of that opinion. And there has been no difference of opinion expressed upon that subject by the learned Judges who delivered their opinions in this House.

Whether the evidence was sufficient to support that charge was a matter which was not debated at the trial before me at Nisi Prius, and it is one which I never thought was to be made a matter of dispute. No argument was urged that such a case was not proved against Mr. Slade at the trial; every thing passed *sub silentio*. But in order that the case might come before the Court above, it was necessary to state a case, and then an entirely different objection was taken in the Court of Error from that which had been presented to me. If that objection had been taken at Nisi Prius the matter would have been sifted much more carefully. I should have heard all the evidence and the observations of the counsel upon the question whether it was sufficiently proved that the defendant was a party to the promise to pay the voter's expenses if he voted for him, and it would have been fully

discussed there and left with proper observations. When *792 the matter came up to the Court of Exchequer Chamber *the principal point argued, and for the first time, was, whether there was sufficient evidence stated upon the bill of exceptions to warrant the jury in coming to a conclusion that Mr. Slade had been a party to the making of a promise to give money to the voter in case he voted for him. I certainly feel very considerable doubt myself whether it is a proper course to take to raise that objection upon a bill of exceptions. I think it should have been by a motion for a new trial for misdirection, or by the proceeding, now little used, of a demurrer to the evidence, when it would have been for the Court to decide whether the evidence set out on the record was sufficient to warrant the direction or not. But it has become a practice of late (I considerably doubt whether it is a right practice) upon a bill of exceptions not merely to raise the question as to the misdirection of the learned Judge in point of law, but also

as to the sufficiency of the evidence to go to the jury, and I proceed to discuss that question, whether there was sufficient evidence in this case to warrant the jury in coming to the conclusion that Mr. Slade himself was a party to the promise to give the voter money upon the implied condition of his voting for him. That question involves two others. The first is, whether there was any such promise held out by anybody to Carter. That depends upon the construction which ought to be put upon the terms of the letter which it appears was sent from Mr. Slade's committee room, at the Lion Hotel, at Cambridge. That letter, signed by the chairman of Mr. Slade's committee, is in these terms [his Lordship read it]. That was a printed letter, and the expense of printing it was paid among the other expenses of Mr. Slade's election. There was added in writing, at the bottom of it, "Your railway expenses will be paid." Taking the whole of that letter together, I conceive there can be little doubt that a * conclusion might * 793 fairly be drawn that the railway expenses were to be paid to the voter if he did that which he was required to do in the printed part of the letter, that is, come to Cambridge, and record his vote for Lord Maidstone and Mr. Slade; it was the conclusion to which the jury properly came.

Upon this part of the case I think there appears to be no doubt at all amongst the great majority of learned Judges who advised your Lordships upon the question. Mr. Baron Bramwell is the only exception.

Then comes the more important question whether for the purposes of this action this letter can be traced to Mr. Slade or his agent. As it is an illegal act for a man to offer to give money to another for voting, I take the law to be clear that a man cannot be guilty by his agent of an illegal act, and be held responsible for that act, unless he has given the agent authority, expressed or implied, to do that illegal act. I know that the law of agency in such cases has been much extended by committees of the House of Commons, but I take it to be a clear proposition of law that if a man employs an agent for a perfectly legal purpose, and that agent does an illegal act, that act does not affect the principal, unless a great deal more is shown; unless it is shown that the principal directed the agent so to act, or really meant he should so act, or afterwards ratified the illegal act, or that he appointed one to be his general agent to do both legal and illegal acts, to do every

thing, in short, which he might think proper to support the interests of the candidate. If the candidate gives his agent such a general authority, and the agent is guilty of bribery, the candidate is no doubt responsible for it. I know that there is a very great difference in Parliamentary practice upon this subject, but I conceive that the rule of law is, as I have laid it down, that no man who is an agent for a legal purpose can make the principal responsible

* 794 * for an illegal act, unless the principal has in some way directly or indirectly authorised it, as I have explained. It was, therefore, I think necessary, and indeed was admitted on all sides to be necessary, to show in this case that the letter was written by the authority expressed or implied of Mr. Slade, and it is upon that part of the case that there is a difference of opinion among the learned Judges, two of them, Mr. Baron Bramwell and Mr. Justice Wightman, being of opinion that there was not sufficient evidence in this case for the jury to conclude that the letter was written by the authority of Mr. Slade. Upon this part of the case, I think, with the majority, that the jurors had a perfect right, upon the evidence, to come to the conclusion at which they arrived; they are the proper judges of the effect of the evidence; they have an opportunity of seeing the witnesses, of observing their demeanour, and the manner in which they give their evidence, and of hearing the very words uttered, and they are therefore much more competent to judge of the evidence than any person can be who merely reads a written statement of it.

There was a case (*Siboni v. Kirkman*¹) in which a direction of mine was questioned, which was very remarkable as showing the difference between what the jurors have to decide, and what would appear upon the written report of the evidence. It was an action brought on a special agreement for the non-delivery of a pianoforte to the plaintiff, on his return, after a long absence from England, in lieu of one sold by him to the defendant. There was a plea on the record, by way of accord and satisfaction, that there was another agreement between the parties, that another pianoforte should be delivered by the defendant to the plaintiff in lieu of it. There was a direction given upon the first trial which the Court

* 795 of * Exchequer thought unsatisfactory, and ordered a second trial. The plea set up was to be proved by the defendant on the second trial before me. The witness for the defend-

¹ 1 M. & W. 418, 4 M. & W. 339.

ant, the defendant's daughter, stated a perfectly good case upon her examination-in-chief. Upon her cross-examination, she utterly contradicted, or qualified, so as to mystify every thing that she had stated before; and so, upon the evidence altogether, there was nothing at all proved, and I accordingly directed that there was no evidence to go to the jury in support of the plea. There was a bill of exceptions, and the Court of Error said that that direction was wrong, because the jurors were the judges of the evidence by seeing the mode in which it was given by the witness; that the contradictions on the cross-examination might be thought by them to have been got out by the skill of counsel from the weakness, but not the falsehood of the witness; and that it was for them to say whether, upon the whole, she had proved the case or not. A *venire de novo* was therefore ordered. These circumstances do not appear distinctly in the case as reported (4 M. & W. 339); but I recollect them perfectly, and have a note of them; and the case is a very strong exemplification of the principle that it is to be left to the jury to consider and put a value on evidence which, on reading, may appear even to be completely contradictory.

I apply that reasoning to the present case, and I ask whether or not the jury might not conclude, from the evidence in the bill of exceptions, Mr. Slade authorised that written memorandum to be added to the printed circular. If so, it amounts to a promise on his part to the voter to pay money in case the voter performed the condition of voting for him.

It appears that all this took place in Mr. Slade's committee room. Mr. Thirkettle added the additional memorandum.

Mr. Thirkettle was produced and examined on *oath as a * 796 witness by the plaintiff, and stated that he was clerk to Mr.

Peed, the election agent; that there was a committee for conducting the election of the Viscount Maidstone and Mr. Slade; that Charles Balls acted as chairman of such committee; that the witness saw Mr. Slade at the committee room, and had in his presence heard the question of travelling expenses discussed, and that Mr. Slade said it was legal to pay travelling expenses to bring up the out-voters, and he, Mr. Slade, gave his opinion for the guidance of Mr. Peed; that Mr. Peed asked Mr. Slade his opinion whether it would be legal to get up the out-voters and pay their legal travelling expenses, what they paid out of pocket; that Mr. Slade made the answer, and that the witness wrote the words "Your railway

expenses will be paid " at the bottom of the said letter above set out, after Mr. Slade had said that the payment of travelling expenses was legal. Observe what the witness does immediately after having heard the mode in which the matter is discussed, as to getting up the out-voters by paying their travelling expenses: he immediately thinks that it will be wise to add to the printed form, " Your travelling expenses will be paid "; and his impression at the time undoubtedly was that Mr. Slade, by what he said, had authorised the insertion of these additional words at the bottom of the printed letter. His so acting at the time is very important; it shows unequivocally what his understanding was. Is it then wrong to say that the jurors were right in coming to the same conclusion that Mr. Slade had, looking at the time and place where it was said, and to the previous conversation, meant to authorise that very thing to be done which was done, and which the witness supposed Mr. Slade to have authorised?

It cannot be denied, I think, that that was a matter for the consideration of the jurymen. They heard the evidence from * 797 the witness of the manner in which the words were used * by Mr. Slade, and in which the witness drew his conclusion, and they were perfectly justified in finding that the note at the bottom of the printed form was put there by Mr. Slade's direction. It matters not for this purpose whether Mr. Slade believed that he was acting rightly or not. I suppose that he did so believe; relying entirely upon Lord Chief Justice Tindal's opinion, he, no doubt, thought that it was proper to pay or to offer to pay the travelling expenses of out-voters, even though the effect of doing so was to induce them to vote for him. I have no doubt that he was perfectly innocent of any intention to violate the law; still, if he did authorise that memorandum to be added to the note, and that note was sent to the voter by his authority, he was acting in violation of the statute.

I am of opinion, therefore, that in this case there is sufficient evidence to warrant the conclusion at which the jurors have arrived on both points, both as to the promises and the payments. I have, however, very great doubt whether I was right in my construction of the obscure terms of the Act, and holding that if a candidate after the election pays a voter money, the moving cause of his doing so being that the voter has given him his vote, the payment is " corrupt "; and as I am perfectly satisfied that the

plaintiff ought not to recover two penalties, one for the promise to pay, and the other for performing the promise by payment, I think, if the plaintiff will consent to abandon the count for the latter penalty by entering a *nolle prosequi*, I shall have no difficulty in advising that the judgment of the Court below ought to be reversed, and judgment entered for the plaintiff on one count.

The following order was afterwards entered on the Journals: That the judgment given in the Court of Exchequer Chamber reversing the judgment of the Court of Queen's Bench on the seventh and eighth counts of the declaration, and awarding a *venire de novo*, be, and the * same is hereby reversed: And * 798 it is further ordered and adjudged, that the original judgment of the Court of Queen's Bench on the seventh count of the declaration for the said plaintiff there, be, and the same is hereby affirmed, the said plaintiff in error having consented that a *nolle prosequi* be entered on the said eighth count of the said declaration; and that the record be remitted.¹

Lords' Journals, 17th April, 1858.

¹ Mr. Lush, on the 25th November, 1858, moved, on behalf of the plaintiff in error, for a rule to direct the Master to tax his costs. He contended that the judgment of the Exchequer Chamber awarding a *venire de novo* had been reversed by this House, and the original judgment of the Court of Queen's Bench declaring the right of the plaintiff had been thereby re-established. The plaintiff in error was consequently entitled, under the 3 Hen. 7, c. 10, and the rule of all the Courts of 1853 (No. 69), to be placed in the same position as if the judgment of the Court of Queen's Bench had never been impeached: *Mackersays v. Ramsey*, 9 Clark & F. 818.

Mr. Couch showed cause in the first instance, and contended that the judgment given in this House was not a simple reversal of that of the Exchequer Chamber, nor a simple re-establishment of that of the Queen's Bench, but was in substance a compromise, for if there had not been a consent to enter a *nolle prosequi* on the 8th count, the award of a *venire de novo* must have been affirmed.

The Court, on this ground, refused the rule.

MIDLAND GREAT WESTERN RAILWAY v. JOHNSON.

1858. April 16, 26, 27.

The DIRECTORS, &c. of the MIDLAND GREAT WEST- ERN RAILWAY of Ireland,	} <i>Appellants.</i>
R. W. JOHNSON and T. W. KINDER,	
	<i>Respondents.</i>

Contract. Depreciation Fund. Mistake. Law and Equity. Corporation. Guaranty Fund.

Mistake as to a contract is a ground for equitable relief, but it must be a mistake in fact, not in law.¹

Mutual mistake as to its construction will not entitle either party to relief in equity.

* 799 Where the law has declared the construction of a contract, a Court * of equity will not interfere to aid either of the parties merely on the ground of their own or their agents' dealings under it, for that would be to make a new contract, which can only be done by mutual consent, by persons properly authorised and in due form.

If such dealings relate to a contract with an incorporated company, the new contract, like the old one, must be under seal.

A. entered into a contract, under seal, with an incorporated railway company to do the haulage work of the company, and to keep in repair its rolling stock. He was likewise to make new rolling stock, and out of the payments which should become due to him, a depreciation fund of five per cent. on the value of the stock as ascertained at the end of each year, was to be formed; "and if the stock has diminished in value more than the allowed depreciation of five per cent., the contractor to pay the difference to the company; if it has increased in value, the company to pay the difference to the contractor." At law, it was held that the fund thus formed belonged to the company. The contractor did not impeach this decision at law, but filed a cause petition in equity, claiming to have this fund allotted to him; on the ground that while the contract continued in operation, the dealings between himself and the company's chief engineer, whose decision "on all and every thing connected with the working of the contract, and the sums to be paid or deducted," was to be binding, without appeal, on both parties, had made monthly and annual calculations, in which the fund was treated as a mere guaranty fund, and had thereby induced him to go to larger expense than he should otherwise have incurred, in order to improve the rolling stock of the company:—

Held, that these circumstances did not establish any ground for equitable relief.

THIS was an appeal against a decretal order of the Lord Chancellor of Ireland and against an order upon a rehearing affirming the same, by which his Lordship declared, "That the petitioners

¹ Cooper v. Phibbs, Law Rep. 2 H. L. 158.

are entitled to be paid the sum of 3728*l.* 10*s.*, being the difference between the sums retained by the respondents on account of the guaranteed fund during the year ending the 31st of July, 1853, and the amount of the depreciation of the working stock of the respondents, as ascertained by valuation of their rolling stock, made in the month of August, 1853."

* The question arose upon articles of agreement, dated * 800 the 21st of February, 1851, between the respondents Johnson and Kinder, of the one part, and the Midland Great Western Railway of Ireland Company, of the other part, by which the respondents undertook to work the rolling stock of the appellants, and covenanted that they would keep in repair the locomotive engines and tenders, carriages and waggons, of the company, of every nature and kind soever, and such stock as may be required for the conveyance of passengers, goods, cattle, and all other things connected with rolling stock and repairs thereof, on and over the line of railway of the company, from Dublin to Galway, at and subject to the several conditions and agreements herein-after mentioned." The contract was to be for a term of five years, commencing from the day on which the contractors should be put into possession of the whole line of railway.

The 5th clause of the agreement was, that "The contractors are to keep the rolling stock in good and perfect condition and efficient working order, to the satisfaction of the chief engineer, who shall be the sole judge thereof. The contractors will be allowed by the company, out of the five per cent. depreciation or reserved fund, the cost of the following articles when replaced new in engines and carriages." To this clause was appended a specification of the articles which were the subject of it.

The 6th clause provided thus: "The contractors nevertheless to be subject to the following deductions, to be made monthly, on account of rolling stock, viz. at the rate of five per cent. per annum as interest, on the estimated value of the rolling stock at the commencement of this contract, consisting partly of engines and carriages which shall have been in use before the commencement of this contract, and which are to be taken at a valuation at the time of commencing this contract, and partly of new * engines and carriages to be furnished by the contractors at * 801 prices to be agreed on between them and the company, the cost price of which is to be added to the amount of the valuation

above mentioned for the purpose of calculating the interest thereon, and also a further deduction of five per cent. per annum payable monthly on the whole of the said estimated amount of the value of the rolling stock as a depreciation fund on the same. Either the company or the contractors to have power to call for a new joint valuation of the whole stock at the end of every year, and if the stock has diminished in value more than the allowed depreciation of five per cent., the contractors to pay the difference to the company ; or if the plant or the stock has increased in value since the last valuation, the company to pay the difference to the contractors, less by any advances they may have made under the heads specified in clause 5."

The 30th clause of the contract provided for an indemnity fund : " The contractors to deposit with the company, either in money or in rolling stock, the sum of 6000*l.* as security for the repairs and depreciation of the whole of the plant and rolling stock in their hands ; and the said sum is to remain in the company's hands until the completion of this contract, said contractors being allowed by the company interest on the same at the rate of five per cent. per annum."

The 35th clause was, " That the decision of the chief engineer of the company upon all and every thing connected with the working of the contract, and the sums to be paid to or deducted from the contractors, shall at all times be final, and binding on both the contractors and the company without appeal."

Possession of the stock was delivered, and the contractors began working on the 31st of July, 1851, and on that day a valuation of the stock was made, amounting to 46,487*l.* On the 31st * 802 of July, 1852, the same stock was * valued at the sum of 44,750*l.* 6*s.*, the amount of actual depreciation according to that valuation being 1736*l.* 14*s.* The depreciation fund of five per cent. which was agreed upon in the contract amounted to 3195*l.* 6*s.* 8*d.*, and deducting the amount of the actual depreciation from the agreed five per cent. depreciation, the balance was 1,458*l.* 12*s.* 8*d.* The sum of 1458*l.* 12*s.* 8*d.* was paid by the appellants to the respondents after the accounts had been certified by the appellants' chief engineer ; but the appellants denied that it was paid on that account. There was contradictory evidence on this point. On the occasion of the first valuation the valuers differed, and Mr. John Viret Gooch was called in as arbitrator. Mr. Gooch

stated the principles on which his award was made, and Mr. Hemans, the appellants' chief engineer, thereupon wrote the following letter to the respondents, dated the 29th October, 1851:—

“As the above-mentioned valuations entail a very heavy loss on the company, on comparison with the original cost of this rolling stock, it becomes my duty to see that the understanding come to between your Mr. Kinder, Mr. Gooch and myself, prior to the latter gentleman's award, be now carried out, namely, that the principle on which the valuation of the engines was arrived at on the valuation should be adopted in all subsequent ones between you and the company; the principle I understand to be as follows: First, a mileage rate of depreciation fixed, and rateable on the number of miles run by the engines, regardless of their actual condition. Secondly, a mileage rate on the miles run by the engines, having reference to their actual condition, as to what it would cost to put them in thorough good working order. Thirdly, the actual state of the public market for new engines of similar description to be taken into account, and the same principles, but with different mileage rates, to apply to the carriages. I cannot consent to recognise the valuation as the basis of our * accounts for haulage, * 803 until these principles and the fixed mileage rate are regularly agreed on.” The respondents assented to the propositions thus presented, but some discussions having arisen on the subject early in the year 1852, Mr. Hemans and the respondents agreed to refer the matter to Mr. Gooch, who wrote a long letter on the subject, which it is not material to quote.

Before receiving payment of the monthly accounts for haulage and repairs, the respondents were required to sign a memorandum, of which the following is a copy:—

“I declare that I have no demand against the Midland Great Western Railway Company on account of mileage contract, save and except the above balance, and any claim I may have through a new valuation on the guaranty fund, and the adjustment of prices according to the number of miles run at the end of the year.” One of the items of deduction in the account to which this was appended, was in these terms: “Less five per cent. per annum on do. as a guaranty fund.”

In July, 1852, and in July, 1853, the valuation was conducted on the principles which had been before arranged between the respondents and Gooch and Hemans, but Hemans then refused to

allow the sum of 3728*l.* 10*s.* (the amount of the difference between the actual depreciation and the depreciation provided for by the five per cent. fund) to be paid back to the respondents or credited to their account.

In October, 1853, the appellants gave notice of their intention to put an end to the contract, which therefore terminated in December of that year.

In January, 1854, the respondents brought an action against the appellants in the Court of Common Pleas in Ireland for work and labour, goods sold and delivered, money paid, and upon an account stated, and also for damages for determining the contract. At the trial of the cause before Lord Chief Justice Monahan, his * 804 Lordship * intimated his opinion to be that, upon the legal construction of the contract, the sum of 3728*l.* 10*s.*, the balance of the depreciation fund, could not be recovered in the action, as he thought that, under the contract, that fund, belonged to the appellants. Objections were taken to this ruling but ultimately the respondents acquiesced in it so far as the Courts of law were concerned.

In June, 1855, the respondents presented their cause petition in the Court of Chancery in Ireland to recover this sum of 3728*l.* 10*s.* The cause was heard before Lord Chancellor Brady in February, 1856, when he made the decretal order in the respondents' favour, which he afterwards affirmed on a rehearing.¹ This appeal was then brought.

The Solicitor-General (Sir H. Cairns) and Sir R. Bethell for the appellants. — It must now be assumed that the proper construction of the contract has been pronounced by a Court of law, and the real question here is, whether that construction is to be disturbed by a claim of an equity supposed to arise out of the dealings of the parties. The argument in support of the existence of that supposed equity is founded on the mode in which the valuers calculated the amount and value of the rolling stock, and the money due thereon, and on the negotiations and discussions which took place between them in the course of that transaction. But that is no ground for a proceeding like this in equity. If they made that calculation under a mistake as to the construction of the contract, their mistake cannot bind the company; for they had no power,

¹ 5 Irish Ch., N. S. 264.

by any thing they could do, to alter the contract, which, being the contract of an incorporated company, was under seal, and could only be altered by the * act of competently authorised * 805 persons, who must themselves make the alteration under seal. A Court of equity possesses no power under such circumstances as exist here to displace the construction of a contract declared by a Court of law. In *Kirk v. The Guardians of the Bromley Union*,¹ a builder entered into a contract to do certain work, which was to be done under the direction of an architect appointed by the guardians, and subject to his approval; no additional work was to be done except on an order in writing; having been paid for all the work done under the contract, the builder filed a bill, alleging that additional work had been done with the knowledge and sanction of the guardians, such work having, in fact, been done upon verbal orders by their architect, and that they had enjoyed the benefit of it. Hence he alleged his equity to arise. On the grounds that a corporation could not be made chargeable in that manner, and that to take advantage of the fact that the work thus done was not done under a written contract, was not inequitable on the part of the corporation, and did not raise an equity in favour of the builder, the bill was dismissed. That case is precisely in point with the present. Here the contractors insisted that the depreciation fund did not belong to the appellants at all events, but was a mere guaranty, or indemnity fund, to cover possible depreciations; but the Lord Chancellor, in his judgment,² said, that no claim whatever to the possession of that fund could be founded on the contract, as to the meaning of which he treated the decision in the Court of Common Pleas to be conclusive; but he thought that an equity arose in favour of the contractors as to something beyond the contract, in consequence of what had been done by the valuers, who had treated the depreciation fund as an indemnity fund. There is no ground for supposing that an equity of that kind can exist in opposition * to the legal rights of the parties as settled by the contract * 806 itself. Here, too, the company's engineer, whose decision on all matters "connected with the working of the contract, and the sums to be paid and deducted, shall at all times be final and binding on both the contractors and the company," has disallowed this claim.

¹ 2 Phill. 640.

² 5 Irish Ch., N. S. 278.

Mr. Craig and Mr. Springall Thompson, for the respondents.—The claim here is not in opposition to the contract, but in addition to it, for the contract itself does not entirely express the intention of the parties. The demand of the respondents in respect of the depreciation fund, might not be the proper subject of an action at law, but it is properly the subject of a proceeding in equity, and has been properly allowed. It is a demand arising out of the conduct of the parties; a verbal contract with a company, though part performed, may not be capable of being sued on at law, but performance of a parol contract may be enforced in equity. *Kirk v. The Bromley Guardians* itself admits that, because, as it is there said by Lord Cottenham,¹ “equity had original jurisdiction over the subject matter, i. e. the contract.” If this demand was not properly the subject of an action at law, then the decision upon it at law is not conclusive. At all events the claim was not conclusively disposed of at law. In *Burn v. Carvalho*,² after a recovery at law by the assignees of a bankrupt, circumstances were held to give the parties who had been unsuccessful at law a title to relief in equity upon the ground of an equitable assignment. That case establishes all that is required to support the decision here.

This was a mere security fund, and when it had discharged its function as such, there was a resulting trust arising in
* 807 * relation to it in favour of the respondents. “Equity claims exclusive jurisdiction in matters of trust and confidence to prevent a wrong where the positive law is silent”; *Fonblanque on equity*.³ The present case is one which comes within the operation of that principle. Had the stock been depreciated to the full extent of the reserve fund, the appellants could not have complained, for there was the fund to answer the depreciation, and the respondents would have been liable to make up the deficiency; so, when it fell short of the fund, they were entitled to the surplus. The respondents laid out their money to improve the stock, and improved it very considerably; they were therefore in equity entitled to have credit for the difference between the amount of actual depreciation and the amount deducted from the payments due to them for the purpose of meeting an anticipated depreciation. That is the equitable claim of the respondents.

¹ 2 Phill. 648.

² 4 B. & Ad. 382, 1 A. & E. 883, 4 Mylne & C. 690.

³ Ed. 1820, c. 1, § 3, p. 28, n.

The contract itself does not refer to the matter, nor say any thing whatever as to the balance which remains after providing for the actual depreciation. The decision on the contract itself therefore has not touched, and could not touch this equity. There is consequently no conflict of decisions at law and in equity; the latter supplies that which the former, assuming it to be correct, had left unfinished.

By the act of the appellants' agent, Hemans, whose decision is to be final, this claim of the respondents was admitted in 1851 and 1852, and the money paid; the respondents were thereby led into a course of expenditure in improving the stock, for which they are now entitled to payment. His conduct is binding on the appellants: *Nicholson v. Hooper*,¹ *Sugden, Vendors and Purchasers*.² *Govett v. Richmond*,³ *Boyd v. Belton*.⁴ It is no answer * to say that a contract existed. The conduct of the par- * 808 ties and agents here was founded on, and had reference to, but was not controlled by the contract. A long course of dealing may modify the provisions even of an ordinary partnership: *Const v. Harris*,⁵ *Custance v. Cunningham*.⁶ [THE LORD CHANCELLOR. — Have you found any case where a course of dealing arising from a mistaken view of the contract, where both parties intended to act under it, has given either of them rights independent of, not to say contrary to, the contract? LORD WENSLEYDALE. — You must contend that by mere equity you can make a new agreement.] There was no mistake as to the contract here. This was a guaranty fund, and such a fund has been recently held by Vice-Chancellor Wood to be a trust fund, so that the person who held it was enabled to pay it into the Court of Chancery under the Trustee Act: *Hankey v. Morley*.⁷ Being a trust fund it was properly the subject of a proceeding in a Court of equity.

THE LORD CHANCELLOR (LORD CHELMSFORD), after fully stating the facts of the case, said: Great stress is laid by the respondents upon the payment of the balance of 1458*l.* 12*s.* 8*d.* in 1852. They say it is a proof that the depreciation fund was a mere guaranty fund, as the company paid to the contractors the difference between the assumed five per cent. depreciation and the actual

¹ 4 Mylne & C. 179.

² 13 ed. p. 611.

³ 7 Sim. 1.

⁴ 1 Jones & L. 730.

⁵ Turn. & R. 523.

⁶ 13 Beav. 363.

⁷ 4 Jur. N. S. 234.

depreciation. On the other hand it is said by the appellants, and proved by the affidavit of their chief engineer, that the respondents had made certain alterations and improvements in a portion of the stock, the value of which amounted to more than the 1458*l.*, and that this sum was allowed in settling the accounts at the end of the first year, as is shown by the accounts themselves

* 809 *certified by the chief engineer. Whatever may be your Lordships' opinion as to the evidence on this subject, it is quite clear that the respondents cannot use it to establish as a fact that it was paid to them as their portion of the depreciation fund, for as to that it wholly fails.

The appellants, the defendants in the action, brought in the Court of Common Pleas, raised a defence distinctly to this sum, for it appears that in their pleas they say, "And for a further defence as to the said sum of 3728*l.* 10*s.* part, &c., the said defendants said that said sum of 3728*l.* 10*s.* was claimed by plaintiffs as a portion of the depreciation fund to which they allege they were entitled against the said defendants, and the defendants said that the plaintiffs were not entitled, under the provisions of the said agreement of the 21st of February, 1851, or otherwise, to recover the said sum of 3728*l.* 10*s.*, or any other sum as depreciation fund from the defendants; and the defendants wholly denied their liability to said claim, and every part thereof; and therefore they defended said action as to the said sum of 3728*l.* 10*s.* so claimed as depreciation fund."

A distinct issue was therefore raised upon this question, whether the defendants were liable to pay to the plaintiffs the sum of 3728*l.* 10*s.* in the second additional defence mentioned, or any and what part thereof. And it was found in favour of the defendants, the company. The jury found upon the tenth issue that the defendants were not liable to pay to the plaintiffs the sum of 3728*l.* 10*s.*

It appears that a special verdict had been originally agreed upon; but this was afterwards abandoned, and the respondents acquiesced in the verdict, and of course they acquiesced in that legal construction of the contract on which the verdict depended.

They afterwards instituted a suit by petition under the * 810 Court of Chancery (Ireland) * Regulation Act of 1850, and the equity which they claimed is described in their cause petition, and also by the Lord Chancellor of Ireland in delivering his judgment in this case. His Lordship, after stating that the

question respecting the construction of the contract was settled in the suit at law by the Lord Chief Justice of the Common Pleas, who held that the contractors could not find in the instrument any ground for insisting that they had any claim under the contract for the payment to them of any thing on account of the depreciation fund, then goes on to describe the nature of the equity which was claimed by the petitioners in their cause petition. He observes,¹ "They say, 'true it is that on the strict letter of this contract we are not able to get back this money, but, what we urge here is, not that we are to have a performance of that contract, but that it is inequitable for you to rely on it, having regard to what has occurred, for we are placed in the position that we have been induced to lay out a large sum on the improvement of the stock belonging to you, the advantage of which expenditure we have given under the belief that we were entitled to the portion we claim out of this fund if we could make a case showing that we had made an equivalent expenditure. We have made such a case; we have acted for your benefit; and you still possess the benefit of our acts. All this was induced by letters, valuations, and accounts, in which you or your agents spoke and acted, so as to create the belief under which we acted, and you therefore must not rely on the strict legal construction of the deed; for, by so doing, you would obtain the same advantage twice over.'"

With very great respect to the Lord Chancellor of Ireland, this appears to me to open an entirely new head of equity. Mistake is undoubtedly one of the grounds for *equitable * 811 interference and relief; but then it must be a mistake not in matters of law, but a mistake of facts. The construction of a contract is clearly matter of law; and if a party acts upon a mistaken view of his rights under a contract, he is no more entitled to relief in equity than he would be in law.

It was contended before your Lordships, on the part of the respondents, that a resulting trust as to the depreciation fund arose upon the face of the contract; and that whenever the actual depreciation fell short of the five per cent., the company became trustees of the respondents for the difference. It is observable that this point was not raised in the cause petition, nor was it involved in the judgment of the Lord Chancellor, and it can only be founded upon the assumption that the depreciation fund was a mere guar-

¹ 5 Irish Ch., N. S. 264, 278.

anty or indemnity fund, which is assuming the whole question; and which, upon my construction of the contract, does not appear to have been intended by the parties.

It is argued that provision being made for the case of the stock having become diminished in value more than the five per cent., and also for the plant or stock having increased in value since the last valuation, and there being nothing expressly provided in the event of the depreciation being less than the five per cent., the parties must necessarily have intended that the five per cent. should bear the character of an indemnity fund. But I draw a contrary inference from those terms of the contract, and collect from them that the intention was that the contractors should be subject to the absolute deduction of five per cent. at all events (probably as the agreed amount of imperceptible depreciation), with the addition of being liable to pay the amount of any increased depreciation be-

yond the five per cent., and being entitled to receive the
 *812 difference of any *increase between the annual valuations subject to deductions in consequence of payment for new articles under the fifth clause. The five per cent., therefore, appears to me to be the central point round which the fluctuations of the rights of the parties, to pay or receive respectively, under the contract, are to turn. And upon this construction of the contract we are not to lose sight of what was urged upon us by the Solicitor-General in his reply, that where the parties intend to provide an indemnity fund they show that they knew how to accomplish that object which is established by reference to that particular clause to which I have already referred your Lordships.

It is not denied, that at law the respondents had no claim upon the depreciation fund under the contract. The Lord Chancellor of Ireland admits that this question is concluded by the judgment of the Court of Common Pleas. But it is said that a Court of equity may deal with it upon the footing of what the parties believed, though erroneously, to be the proper construction. It seems, however, to me quite impossible to found an equity upon the ground of mutual mistake, to the extent of making a different contract from the one agreed to by the parties, and yet that must necessarily be the result of the equity which is here sought to be applied. It is quite clear that if the valuations proceeded upon erroneous principles (of which there is no very distinct evidence) they were founded upon the valuer's construction of the contract,

and with a view of carrying its provisions into effect. For it is stated in the affidavit of Thornton, one of the valuers, that at the time of making the valuations the contract was given to the valuers, together with the previous valuations; and from reading the same, it appeared to him that the contractors were entitled to get back any difference at the end of the year.

* But suppose that it could be successfully established * 813 that there was a new course of dealing which was such a departure from the original contract, as to amount to a variation of the contract by mutual consent, the case of the respondents would still not be much advanced as the appellants are an incorporated company, having contracted under seal, and a mere verbal variation of the contract would not be binding upon them. The directors, no doubt, would have a control over the contract, and the company might vary the contract by the acts of its agents authorised for that purpose, but then the variation must be effected in the proper manner. The case of *Kirk v. The Guardians of Bromley Union*¹ seems a strong authority against the respondents on this point.

I consider it quite unnecessary to enter into a consideration of the particular facts of the case. Hemans clearly was not the agent of the company to vary the contract, nor could Gooch receive any authority to settle the rights of the company except upon the footing of that contract. Whether Thornton, the company's valuer, proceeded upon the valuation of the preceding year, or upon Gooch's judgment, is uncertain. But the expression of his opinion, that if it had been stated to him and the other valuers, that the agreement between the contractors and the company was that in all cases, independent of the valuation, the five per cent. depreciation fund was to be the property of the company, the valuation would have been made on a different principle, and no deduction would have been then made for necessary depreciation, and thereby the allowance for depreciation would have been less, might perhaps furnish a ground for correcting the valuation in equity, though as this would be the result of a mistaken view of the contract, even that may be *doubtful; but it * 814 could not possibly operate upon the contract itself.

I cannot, therefore, bring myself to agree with the judgment pronounced by the Lord Chancellor of Ireland. Here is a contract

¹ 2 Phill. 640.

under seal, upon which a Court of law has put a clear and correct construction ; and the Lord Chancellor does not assume to vary that construction ; but, on the contrary, adheres to and sanctions it. But upon the ground of a supposed misapprehension of the parties as to their rights, he gives relief to the extent of annulling the contract into which they have entered, and imposing a new one upon them ; thus has assumed a jurisdiction beyond any which, as far as I can discover, has ever before been exercised by a Court of equity. Under these circumstances, I feel compelled to recommend to your Lordships that the decree of the Lord Chancellor of Ireland be reversed.

LORD WENSLEYDALE. — My Lords, I concur with my noble and learned friend in the advice he has given that we ought to reverse the decretal order of the late Lord Chancellor of Ireland. I do this with great reluctance, from the great respect which I entertain for the high authority of that learned person. It is a satisfaction to me to find in the present case that the difference in judgment is not a difference relating to any point of law, but one arising out of a different view that is taken of the facts of the case. It is on account of a wrong decision on a point of fact, and not a wrong decision in point of law, that I object to the Lord Chancellor's decretal order.

As it regards the law, the case is a perfectly clear one. It is founded, as my noble and learned friend has intimated, upon the construction of the original deed which was the
 * 815 * subject of the action brought in the year 1854 ; and the question turns upon the construction of one clause in that deed. The deed is a contract for haulage [his Lordship read several of the clauses].

The company having put an end to that contract, an action was brought on it, and then, as part of the defence, the appellants claimed to be entitled to retain the sum now in dispute out of the depreciation fund, upon the ground that there had been a depreciation to the full amount ; and they claimed it not by way of set off, but by way of deduction from the sum sought to be recovered for haulage by the contractors.

That matter was of course considered by Lord Chief Justice Monahan, at the time of the trial, and he gave his opinion that the appellants were entitled absolutely to that deduction. The plaintiffs (now the respondents) declined to bring a writ of error

upon that, or to have a special verdict; but brought the same question again before the Lord Chancellor of Ireland; and he, too, was of opinion that the law was perfectly clear that the appellants were entitled at law to retain that sum, and upon the full consideration which we have had an opportunity of giving to the case during the argument, I cannot figure to myself any doubt as to that question. Therefore, if the contractors are entitled to recover this sum in the present suit, it must be entirely upon some ground in equity.

The contractors presented a cause petition for the purpose of establishing their claim. This cause petition was presented under an Act which passed in the year 1850, for the purpose of diminishing the expense, technicality, and length of pleadings in equity. Now certainly it may be considered as a wise measure to accomplish the object of diminishing the expense and necessary tediousness of proceedings in the Court of Chancery, and to obtain the statement * of all equitable claims in a com- * 816 pendious form; but undoubtedly one sees in the present case that though by that course you gain a great deal in point of saving of expense, you lose something in point of accuracy and clearness of statement. For we have to look at the cause petition itself to see upon what grounds of equity the respondents claim to be entitled to recover back again that which the appellants had a clear right at law to retain. We have very great difficulty in seeing what is the precise equitable ground stated in the cause petition (stated loosely and inaccurately) to entitle them to recover that which they are clearly bound in point of law to give up.

We have had before us several grounds stated, two of which appear not to have been set up by the cause petition at all. The first ground which was urged in the argument at the bar was that this depreciation fund was not a sum which the appellants were entitled to keep on the re-valuation of the rolling stock, but that it was a guaranty fund; a fund accompanied with a resulting trust in favour of the contractors in certain events. I am at a loss whence to collect, or to infer that there exists such a trust. If you look through the deed, you cannot make out that there is any trust contained in the deed. On the contrary, you see this fund clearly distinguished from the fund which is made the trust fund, namely, the guaranty fund of 6000*l.* mentioned towards the close of these articles, which is expressly said to be a guaranty

fund. If the parties had meant this to be a guaranty fund not to be retained by the company, certainly they knew in what terms to explain that intention. They have not done that, and you cannot infer by reason of any articles contained in the deed itself, that this was to be a fund in trust merely to answer actual depreciation for want of repairs of the rolling stock. It seems to me to be

quite out of the question to say that there is any trust
* 817 * implied by the terms of the deed. And certainly that is not the case which is made by the cause petition.

Then it has been suggested by the respondents, that this deed does not contain the real intention of the parties; that it is a deed drawn up by mistake. There is some ground to think that the parties have mistaken the meaning of this contract. I particularly refer to that monthly account or certificate which is to be sent in, and which certainly seems to have been prepared by persons who had a view of this contract as if the depreciation fund was not actually to be retained by the appellants, but was to be a mere guaranty fund against ultimate loss.

The memorandum required to be signed by the respondents certainly shows that the persons, whoever they were, who framed that certificate, did so understand it at that time [his Lordship read it]. Now that claim upon the depreciation fund through a new valuation could not arise unless upon the supposition that this was to be deemed a guaranty fund. I think the explanations given are by no means satisfactory. But by whom that instrument was prepared, whether by the agents of the appellants or by the contractors, or at what time it was prepared, whether immediately after the commencement of the hauling, or at what other time, we do not know. If this could be considered as any ground for altering the nature of the contract, as a proof that both parties understood that the contract really was that this sum was not to be paid out and out to the appellants or retained for their use, but that it was to be simply a guaranty fund, then it ought to have been made the ground of an application to reform the contract, though it would have been of itself quite an insufficient ground, because there is no proof that this was really in the contemplation of the parties at the time that the deed was
* 818 framed, and that therefore the deed * was framed by mistake. As a ground for altering the construction of the deed, I take it to be quite insufficient.

Therefore we must now see upon what it is that this equity is to be established. Looking at the terms of the cause petition, which are somewhat vague, it is evident that it must be something that has occurred since the contract was entered into which is to disentitle the appellants to their remedy upon the covenant contained in the deed, which is an absolute covenant to pay the money, and which must be taken to express the true intention and meaning of the parties. I think it appears to have been considered by the Lord Chancellor of Ireland that there is something in the subsequent conduct of the parties, showing that they had agreed to deal together upon a different footing, and to consider this fund not as the absolute property of the appellants, but as merely an indemnity fund to secure them against actual losses; that they had agreed so to consider it, and that they have subsequently acted upon that agreement; and that having thus induced the contractors to incur expense upon the faith of that being the meaning of the contract, having thus made a fresh agreement, they were now not to be permitted to withdraw from it.

That is a matter which is to be proved on the part of those who insist upon that equity. And it is for default of such proof that I cannot concur in the opinion of the Lord Chancellor of Ireland. It seems to me that the respondents have failed to make out that proposition satisfactorily. In order to make it out, in the first place, they must show that there were persons who were dealing upon this subject, who were agents of the company for the purpose of entering into a fresh contract different from the old one. There is no evidence at all in this case that the persons who are supposed to have entered into this * fresh contract were * 819 agents of the company for that purpose. A company, being a corporate body, can only be bound by a fresh contract under seal, or, in the case of a railway company, by something done in the manner pointed out by the Act of Parliament, that is, by a contract entered into by the directors, who alone are entitled, under the statute, to enter into a new contract, although not under seal. But there is no pretence to say that there was, in this case, any thing of the sort, any sanction of the directors, or of any person whatsoever connected with the company, except of some persons who were mere agents to carry on the business of the company in seeing that its working stock was in proper order, and that the railway was properly conducted. No other persons ap-

pear to have done any thing that could be considered as entering into a fresh contract. Therefore it seems to me that there is a total failure in this case of any thing to show the consent of those persons whose consent would be necessary to bind the company to a new agreement. This ground is not very specifically or pointedly stated in the cause petition. It ought, I conceive, to have been stated, that the persons who entered into this fresh contract were agents of the appellants for that purpose, so as to put the appellants to answer whether they were truly such agents for that purpose or not. That has not been done here. And we have not, in this present stage of these proceedings, any thing before us which entitles us to say that those persons had any authority to bind the company by any such new contract.

But though it is admitted that they have no power to bind the appellants by a new contract, it is said, they have so conducted themselves as to induce the contractors to act upon the faith that if they increased their expenditure upon the works, they would have the benefit of this depreciation fund. Now, looking * 820 attentively at the evidence, I * cannot find that to be at all sustained by the facts proved. The respondents' case totally fails in that respect. Besides which, it does not appear to me that they have really proved any case of a change of contract; but that, on the contrary, there is every indication that the parties meant to go on under the original contract without varying it. They do not appear to have had any intention to vary it at all. What they did was done under the supposition that they were bound to do it under the contract. They did it under a mistaken view of the construction of the contract.

It therefore seems to me, looking at all the facts, that the case is entirely deficient in making out any special case upon the equity of which the Lord Chancellor of Ireland appears to have acted. I think, therefore, that in this case the view which the Lord Chancellor of Ireland has taken of the facts of the case is not a correct one. If it had been established that there was a new agreement between the contractors and proper parties binding the appellants to act differently, and to change entirely the arrangements under this deed, then, I think, this equity might have been supported, and a decree made in favour of the contractors. But it seems to me that that case has entirely failed, and that there is no ground at all to prevent the appellants having the benefit of that judg-

ment which they have obtained at law. And therefore I think that in this case the decree of the Lord Chancellor of Ireland is wrong.

It appears to me quite clear that, according to the true construction of the original contract, this is not to be an indemnity fund at all. The contract expresses clearly enough what is to be done with the fund. After the payment in satisfaction of those demands which are made upon it under the fifth clause, there is no provision at all with respect to that which is retained by the company. It *is, in fact, a fund to represent the * 821 depreciation of stock during the time that it is held by the contractors. I think, therefore, that at law there is really no question upon it; and I think that at equity it is clear that there is no implied trust. This is not a case of resulting trust, because this is a case of contract, not of a sum of money put into a person's hands to answer a particular purpose, where there is a resulting trust that the remainder of that sum should be paid over to the person who puts it into his hands. This is the case of a contract to lend rolling stock on the one hand, and to pay for the use of it on the other; and, unless there is an express stipulation that the depreciation fund so to be paid is to be subject to some form of trust, it must be held to belong to the persons to whom it is paid. There is, therefore, an end altogether of any question of implied trust in this case. And there is equally an end of any ground for altering the original contract between the parties. It was not at first pretended that it did not express the real intention of the parties. And although it might appear that the parties had a mistaken view of the nature of the contract they had entered into, that would not entitle the respondents to any relief in equity unless they can show that it is a contract that did not really represent the intentions of the parties at the time. And that I have disposed of already.

The last question is whether there is any equity arising upon the dealing and transaction of the parties subsequently. I think there is not. If the facts shown had amounted to an agreement, or to a representation so as to induce the other party to alter his conduct upon the faith that the original agreement would not be acted upon, but another substituted agreement, in that case I think there would have been an equity. And that is the ground upon which the Lord Chancellor of Ireland proceeded; but the

- * 822 * ground of that judgment is, in my opinion, not established by the evidence.

THE LORD CHANCELLOR. — Your Lordships will declare that the cause petition ought to have been dismissed, and with that declaration you will remit the case to the Court of Chancery in Ireland.

Decretal order reversed with a declaration.

Lords' Journals, 29th April, 1858.

1857. July 6, 7. 1858. February 15; April 17.

ANN RODDY and others, *Plaintiffs in error*.¹

FRANCIS FITZGERALD, *Defendant in error*.

Devise. Estate Tail. "Heirs of the Body." "Issue." Contingent Remainders. Recovery.

Devise (in 1817) of a freehold estate for lives renewable for ever, "to my son W. during his life, and after his death, to his lawful issue, in such manner, shares, and proportions as he, by deed or will, shall appoint, and for want of such appointment then to his issue equally, if more than one; and, if only one child, to said child; and in failure of issue of W.," to J. Another estate consisting of fee simple lands, was devised in the same terms to another son, J.; and on failure of the issue of J., it was to go to W. J., and W., before the birth of any child to W. (J. himself never married), joined in a recovery as to the lands devised to J., and to which W. afterwards succeeded in possession on J.'s death without issue. W. died, leaving four children; he had not executed any appointment, but during his life disposed of both descriptions of lands to creditors for value:—

Held that under these devises each of the first devisees took an estate tail by implication.

Where in a devise there is a gift over on general failure of "issue," it is presumed that the word "issue" has been used by the testator as meaning "heirs of the body."

When the word "issue" is so employed, it is for the party seeking to give it a

¹ Lambert v. Peyton, 8 H. L. Cas. 6; Jenkins v. Hughes, 8 H. L. Cas. 579; Atkinson v. Holtby, 10 H. L. Cas. 318; Watkins v. Frederick, 11 H. L. Cas. 362; Coltsmann v. Coltsmann, Law Rep. 3 H. L. 125.

meaning other than that which it frequently bears, to show clearly from the context of the will that the testator intended to give it a different meaning.

The remainders here were contingent, and therefore the recovery, suffered as to the fee simple lands, operated as a bar to them whether the first devisee did or did not take an estate tail.

By an order of the commissioners for the sale of encumbered estates in Ireland, dated 18th December, 1852, and made in a matter wherein Francis Fitzgerald was petitioner, an ejectment was ordered to be brought in the Court of Common Pleas there, to determine the construction to be put upon the will of one Charles Roddy. These estates had been possessed during his life by William Roddy, deceased, against whom Fitzgerald claimed as a judgment creditor. Fitzgerald¹ was ordered * 824 to be the plaintiff in the action, and Anne Roddy and others, the children of William Roddy, to be the defendants.

The cause was tried on the 17th June, 1853, before Lord Chief Justice Monahan, and the jury found a special verdict, which set forth in substance the following matters: —

Charles Roddy, of Clones, in the county of Monaghan, was, at the time of the making of his last will and testament, bearing date 21st day of September, 1817, and thence until his death in 1822, seised in fee simple of the lands of Tanatygarman, Corradagh, Drutaney, and Knockawelt, with a sub-denomination called Golan, and also of a freehold estate for lives which had been granted to him and his heirs, was still subsisting, and was (by covenant) renewable for ever, of and in the lands of Carrigans and Clinumphry, with a sub-denomination called Salcony, and in the county of Fermanagh, subject to a demise for one life, still subsisting, of eleven acres of the lands of Knockawelt, bearing date the 1st November, 1801, reserving a yearly rent of 13*l.* 1*s.* late currency.

The testator, after bequeathing an annuity of 50*l.* per annum to his wife (with power of distress and entry), charged on the lands of Clinumphry and Carrigans, proceeded thus: —

“ I give and devise unto my son, John Roddy, the aforesaid lands of Clinumphry and Carrigans, subject to said annuity of 50*l.*, payable to his mother, to hold during his life and after his decease,

¹ The cause throughout the proceedings in Ireland and here was called by the name of Roddy v. Fitzgerald; but at a certain stage of it in Ireland, Fitzgerald's claim was disposed of, and Clifford, who was a mortgagee, went on with the case.

I give and devise the same to his lawful issue in such manner, shares, and proportions as he may by deed or will duly attested limit, direct, or appoint, and in case of no such appointment * 825 then to his * issue equally share alike; and if only one child to such only child, and in case of said John dying without issue, I give and devise the said lands subject as aforesaid, to my son William and his lawful issue, with like power of appointment as before mentioned; and in failure of such appointment to such issue equally, and if only one child then to such child; and in case of my son William dying without issue, I then give and devise the said lands subject as aforesaid to my son Thomas and his lawful issue, with like power of appointment, and for want of such appointment to his issue equally, or if only one child then to said child; and if my said son Thomas shall die without issue, then I give and devise said lands to my son Bernard, his heirs and assigns for ever." He then gave an annuity charged on the lands of Tanatygarman and Corrardaghy, with power of entry and distress in case of nonpayment, and proceeded thus: "and subject to said annuity, I give and devise the said lands of Tanatygarman and Corrardaghy to my son William during his life, and after his death to his lawful issue in such manner, shares, and proportions, as he by deed or will duly attested, shall direct, limit, or appoint, and for want of such appointment to his issue equally, if more than one child, and if only one child to said child; and on failure of issue of my son William, I give and devise said lands last mentioned, to my son John, and his issue with like power of appointment, and in case of no appointment to such issue equally, and if only one child to such child, and for want of issue of my son John, I give and devise said lands to my son Thomas and his issue, with the like power of appointment to my son Thomas, and for want of such appointment to his issue equally, and if only one child to said child; and in failure of issue of my son Thomas. I give and devise said lands to my son Bernard, his heirs and * 826 assigns for ever. I give and devise * unto my son Thomas, the lands of Knockawelt and Drutaney, in the county of Fermanagh, for his life, and upon his death, I give the said lands to his issue in such manner, shares and proportions as my said son Thomas shall by deed or will duly attested, limit, direct, or appoint, and for want of such appointment to his issue equally, and if but one child to said child, and in failure of issue of my said son

Thomas, I give and devise said last-mentioned lands to my son William and his lawful issue, with like power of appointment, and for want of such appointment to his issue equally ; and if only one child to that child, and in failure of issue of my son William, I give and devise said lands to my son John and his lawful issue, with like power of appointment ; and for want of such appointment to his issue equally ; and if but one child to said child ; and failing issue of my son John, I give and devise said lands to my son Bernard, his heirs and assigns for ever."

The testator died 21st November, 1822.

Bernard Roddy, named in the will, was the eldest son of the said testator, but died in his lifetime without issue.

At the time of the testator's death William Roddy was his eldest surviving son and heir at law.

Thomas Roddy, named in the will, died in 1825 unmarried and intestate.

By two several indentures of conveyance, bearing date 9th August, 1830, and 25th February, 1831, John Roddy, after reciting that he was entitled to the freehold lands of Carrigans and Clinumphry, devised to him by the will for the term of his life, conveyed the same to his brother William Roddy (subject to the annuity), to hold for the term of the life of said John Roddy.

In September, 1833, in order to secure payment of 1500*l.* due to a person named Fulton, William Roddy conveyed the lands of Tanatygarman and Corradaghy, and those of * Drutaney * 827 and Knockawelt to Richard Jennings, for the purpose of afterwards suffering a recovering of the same, and in Michaelmas term of the same year the recovery was suffered. Fulton afterwards conveyed to Clifford.

William Roddy married in 1835, and had issue one child born in 1836, but which died in the same year, and he had also issue of the said marriage four other children, who were now the plaintiffs in error.

John Roddy died 4th December, 1846, intestate and without having had issue, leaving William Roddy, his eldest brother and heir at law him surviving. In January, 1847, William Roddy (in whom all the devised lands thus centred) mortgaged the lands of Carrigans and Clinumphry to Clifford, in consideration of a further loan of 850*l.*

William Roddy made his will, dated 28th September, 1850, whereby in exercise of the power of appointment vested in him by the will of his father, he gave and devised to his four children, the plaintiffs in error, all his real and personal estate equally to be divided amongst them share and share alike. He died in April of the following year.

Upon the facts stated in this special verdict, it was contended on behalf of the plaintiffs in error that according to the true construction of the will of Charles Roddy, his devisees, viz. John Roddy, William Roddy, and Thomas Roddy, took respectively only estates for life, with remainder to the plaintiffs in error as the children of William Roddy, as tenants in tail, and that the common recovery was not intended to, and had not the effect of destroying the contingent remainders in the fee simple lands. The defendants in error on the contrary, contended that the devisees respectively took estates in tail, or *quasi* tail, in the lands held in fee simple, and a freehold estate of inheritance, in the lands held under the lease for lives renewable for ever; and further,

* 828 that so far as related * to the fee simple lands, even assuming that William Roddy was only tenant for life, as the plaintiffs were not *in esse* when the recovery was suffered, the remainders limited to them, being contingent only, were thereby destroyed.

Judgment was given by the Court of Common Pleas on the 15th June, 1854, in favour of the plaintiff below, the defendant in error; which judgment was, in point of form, affirmed by the Court of Exchequer Chamber in Ireland, on the 17th day of January, 1856, but without costs, the Court, composed of ten Judges, having been equally divided, viz. the Lord Chief Justice of the Common Pleas, the Lord Chief Baron Pigott, Mr. Justice Torrens, Mr. Justice Perrin, and Mr. Justice Jackson being in support of the judgment of the Court below; and the Lord Chief Justice of the Queen's Bench, Mr. Baron Pennefather, Mr. Justice Ball, Mr. Justice Moore, and Mr. Baron Greene, having given their judgment so far as concerned the lands held in freehold for lives, to reverse the judgment of the Court of Common Pleas.¹

This proceeding in error was then taken.²

¹ 4 Irish Law, N. S. 74.

² This was the first case brought to the House of Lords under the new Uniformity of Process Act for Ireland.

Mr. Napier and *Mr. R. Palmer* (*Mr. John M'Mahon* of the Irish bar was with them) for the plaintiffs in error. — Under this will the devisees of the fee simple lands took, respectively, estates for life, with remainder in fee to their children, who take as purchasers. As to the freehold lands on lives renewable for ever, the devisees also took a life estate with like remainders. Nothing done by John and William Roddy has affected their interests with regard to either of these estates. All the parts of this will can have effect given to them, and there is no need to sacrifice the particular to the general intention. * Even if two dif- * 829 ferent intentions were thus manifested, there is no rule that one shall be sacrificed to the other, unless it is impossible to give effect to both. *Crozier v. Crozier*,¹ *Monypenny v. Dering*,² which underwent a most elaborate discussion in the Courts of Common Law³ as well as Chancery. That rule was not then for the first time acted on, for in *Keating v. Keating*,⁴ where the devise was to trustees for R. for life, remainder to the issue of R. in such manner as he should appoint, for want of which to the first son of the body of R., and if no issue male, to the daughter of R., and for want of such issue, over, effect was given to the particular intent, and R. was held to take an estate for life only. In *Doe d. Gallini v. Gallini*,⁵ it was expressly declared that the doctrine that the general intent was to be preferred to the particular intent, was vague and incorrect, and as to the use and meaning of technical words, the rule as stated in *Jesson v. Wright*⁶ was adopted, namely, that such words are to have their technical meaning, unless there are others used in the same will, which make it perfectly clear that the testator did not use the technical words in their technical sense. That is the case here, consequently it is submitted that the use of the word “issue” cannot be made to give an estate tail to the first takers under the respective devises. The cases already quoted are instances of the application of this rule, and in them the word “issue” was construed with reference to the intention of the testator, and was not allowed of itself to create an estate tail. In *Montgomery v. Montgomery*,⁷ the devise was to “my son, W. M., during his natural life, and no longer,” unless

¹ 3 Drury & War. 373.² 16 M. & W. 418.³ 2 De G., M. & G. 145.⁴ Lloyd & G. temp. Plunk. 291.⁵ 5 B. & Ad. 621, 639, and see 3 A. & E. 340.⁶ 2 Bligh, 1, 49.⁷ 8 Irish Eq. 740, 749.

* 830 * he shall survive his present wife and marry a second, "by whom he shall have lawful issue, then upon the death of my son, leaving issue male of such second marriage to such issue male, share and share alike," &c. Lord Chancellor Sugden, notwithstanding the form of the gift to the issue, held that W. M. took for life with remainder to the issue of the second marriage in fee, and in the course of giving judgment, he said "it is settled that 'issue' in a will is either a word of purchase or of limitation, as will best effectuate the intention of the testator." *Flood v. Digby*¹ is a strong authority to the same effect. Here, as in *Farrant v. Nichols*,² the testator has used "issue" with the meaning of "child," throughout the will. In *Lees v. Mosley*³ it was said that "whatever be the *prima facie* meaning of the word 'issue,' it will yield to the intention of the testator to be collected from the will; and it requires a less demonstrative context to show such intention than the technical expression, 'heirs of the body' would do." *Kavanagh v. Morland*,⁴ *Blackborn v. Edgley*,⁵ *Morse v. The Marquis of Ormonde*,⁶ *Turbuck v. Turbuck*,⁷ *Woodhouse v. Herrick*,⁸ *Crozier v. Crozier*,⁹ *Montgomery v. Montgomery*,¹⁰ *North v. Martin*,¹¹ *Graves v. Hicks*,¹² *Williams v. Teale*,¹³ *Merest v. James*,¹⁴ *Bryan v. Mansion*,¹⁵ *Carter v. Bentall*,¹⁶ all treat "issue" as meaning "children," where the intention of the testator requires it, and the last case is directly in point with the present, be-

* 831 cause there as here the words "child" * and "issue" are interchangeably employed. *Edwards v. Edwards*,¹⁷ and *Ridgeway v. Munkittrick*,¹⁸ are to the same effect; and in *Baker v. Tucker*,¹⁹ a devise to J. B., a reputed son, for life, and after his death to his first and every other son successively in tail male, and in default to his daughters, and in default of issue of J. B., to the testator's right heirs. J. B. was held to take only an

¹ 1 Jones, Exch. Irish, 520.² 1 Younge & C. Exch. 589.³ 9 Beav. 327.⁴ Kay, 16. See also per Maule, J., *Doe d. Cannon v. Rucastle*, 8 C. B. 876.⁵ 1 P. Wms. 600, 605.⁶ 5 Madd. 99, 1 Russ. 382.⁷ 2 Jarm. on Wills, 375 (S. C. 4 Law J. N. S. Ch. 129).⁸ 1 Kay & J. 352.⁹ 1 Brod. & B. 424.¹⁰ 3 Drury & War. 373.¹¹ 5 De G. & S. 737.¹² 8 Irish Eq. 740.¹³ 2 Beav. 551.¹⁴ 6 Sim. 266.¹⁵ 12 Beav. 97.¹⁶ 5 A. & E. 38.¹⁷ 1 Drury & War. 84.¹⁸ 6 Hare, 239.¹⁹ 3 H. L. Cas. 106.

estate for life, and that no remainder in tail to him could be implied after the remainder to his daughters. In *Leeming v. Sherratt*,¹ a testator gave pecuniary legacies to his daughters respectively, one half to be invested and secured from the control of any husband, the interest to be paid to them in the mean time, and the principal to be disposed of as they should direct to their issue, but in case they should die without issue, the principal to go among the survivors of his children in equal shares, it was held that the first bequest was limited to the issue living at the death of the children, and that the gift over on failure of issue referred to the same objects.

There are some cases in Ireland which appear to proceed on an opposite rule, but the answer to them is, that not one of them presents the same combination of circumstances that exists here, and that each appears to have been decided on the particular words of each will, and not on any general doctrine.

The power of appointment here given establishes the fact that the testator used the word "issue" with the meaning of children. The first taker might have appointed the "manner," that is, the quantity of estate, and the "shares and proportions," in which the children should take; but in default of such appointment the estate is to go to his "issue equally if more than one, and if only one * child, to such only child." Here the two words * 832 are plainly used, in exactly the same sense, and the gift being of the whole estate they would take in fee. The use of the word "manner" shows that the appointment might have been in fee, and if no appointment was made, they would take the same estate as they might have taken under an appointment. *The King v. The Marquis of Stafford*,² Sugden on "Powers."³

Mr. Walker and *Mr. Smith* (of the Irish bar; *Mr. Fleming* was with them, for the defendant in error. — The defendant in error claims as a purchaser for value, and is entitled to all the advantages of that character.

The first devisees here took an estate tail. The word "issue" must here receive its proper legal meaning, for there is nothing in the will which compels the Courts to give it any other, and unless there is so, that meaning must be attached to it. That is the prin-

¹ 2 Hare, 14.

² 7th ed. 481, 483.

³ 7 East, 521.

ciple laid down in *Jesson v. Wright*,¹ and which has ever since been deemed the true rule of construction. *Montgomery v. Montgomery*,² is not an authority the other way, for there the general rule was asserted, but the case was held to be taken out of its operation by the particular words of the will. In that case the gift was "for life, and no longer," and the other provisions of the will were taken to indicate the clear intention of the testator that the devisee should take no larger estate; but without such clear intention even the words "no longer," would not have had that operation; * 833 for in *Robinson v. Robinson*,³ a devise to H. "for life, and no longer, taking the name of R., and after his decease to such son, as he should have, and for default of such issue over," was held to create an estate to H. in tail male.

Every thing in this will shows this to have been the intention of the testator. Immediately following the devise is a power to the first taker to appoint among his issue "in such manner, shares, and proportions" as he may direct. The phrase "in manner" has been contended to refer to the nature of the estate he might appoint, and it has been argued that he might appoint in fee. It cannot be supposed that it was intended he should possess a power to grant an estate greater than that which he himself enjoyed; and though if he was entitled to an estate tail he might defeat the remainder altogether, yet that circumstance is not an argument to show that he was not intended to have such an estate, but, on the contrary, the grant of the power is an evidence of the intention of the testator to confide to him full authority over the estate. To give to the word "issue" the meaning of "children" would be to restrain the exercise of a power unrestrained in the words which created it. If it only applied to children it would be restricted to such of the children as happened to be alive at the death of the person to whom the power was intrusted, *Heron v. Stokes*,⁴ *Walsh v. Wallinger*,⁵ *Brown v. Pocock*.⁶ This never could have been the testator's intention.

As to all the cases cited on the other side with respect to the

¹ 2 Bligh, 1.

² 8 Irish Eq. 740, 3 Jones & L. 47.

³ 1 Burr. 38, 3 Atk. 736, 2 Ves. 225, S. C. nom. *Robinson v. Hicks*, 3 Brown, P. C. 180.

⁴ 3 Irish Eq. 163 (Lord Plunket); 4 Irish Eq. 284, and 2 Drury & War. 89 (Lord Chr. Sugden); and see 12 Clark & F. 161.

⁵ 2 Russ. & M. 78.

⁶ 6 Sim. 257.

meaning to be given to the word "issue," it is to be observed that that word has only been translated "children," where the two words were used in the same * sentence and formed part * 834 of the same substantive devise, and were plainly used by the testator as having the same meaning, and where the Courts felt themselves embarrassed by the difficulties that would arise from giving to the word "issue" its proper meaning and effect. Each of them must be looked on as an exception to the general rule of construction. Therefore in *Head v. Randall*,¹ though with respect to the personalty there bequeathed, the word "issue" received the meaning of "children," because of the plain and unquestionable intention of the testator, yet as to the devise of the realty, where the intention was not so plainly manifested, the Court held itself bound to adopt the general rule of construction, and to give to that word its proper technical meaning.

On the other hand, the cases which show that a devise such as this gives an estate tail to the first taker are numerous and consistent. *Tate v. Clarke*,² *Doe d. Bosnall v. Harvey*,³ *Doe v. Rucastle*,⁴ *Martin v. M' Causland*,⁵ *Irwin v. Cuff*,⁶ *Briscoe v. Briscoe*,⁷ in the last of which the devise was to B. C. and D. for their respective lives, with remainder to their issue male respectively, in such shares and proportions as they respectively should appoint, and in case they should die without issue, male or female, or if all issue should fail, then over, and the Court held that B. took an estate *quasi* in tail. The same was held under similar language of devise in *Wight v. Leigh*,⁸ and in *Allen v. Allen*.⁹ These decisions were in conformity with those of *Backhouse v. Wells*,¹⁰ and *Shaw v. Weigh*.¹¹ In *Dodson v. Grew*,¹² the words originally used * 835 in the will were "heirs male of his body," the word "heirs" was afterwards struck out, and the word "issue" substituted, so that there seemed a particular intent in the use of that word, but the Court gave effect to the general intent, and held that the first taker took an estate tail. *Frank v. Stovin*,¹³ followed the rule in

¹ 2 Younge & C. Ch. 231.

² 1 Beav. 100.

³ 4 B. & C. 610.

⁴ 8 C. B. 176.

⁵ 4 Irish Law, 340.

⁶ Hayes, Exch. 30.

⁷ Hayes, Exch. 34.

⁸ 15 Ves. 564.

⁹ 2 Drury & War. 307.

¹⁰ 1 Eq. Cas. Abr. 184, pl. 27.

¹¹ 1 Eq. Cas. Abr. 184, pl. 28.

¹² Wilm. Notes, 272, 2 Wils. 322.

¹³ 3 East, 548.

Shaw v. Weigh,¹ and *Denn d. Webb v. Puckey*,² applied it in all its consequences. There the devise was to A. for life without impeachment of waste, and after his decease to the issue male of his body, and to the heirs and assigns of such issue male, and for default of such issue male to B., &c. It was held that A. took an estate tail. But further it was held, that supposing him only to take for life, yet as the remainder to his issue and the subsequent remainders were contingent, they might be barred by a recovery suffered by him before issue born, for which last point *Robinson v. Comyns*,³ is an authority. Estates tail were held to be created in *Mellish v. Mellish*,⁴ *Broadhurst v. Morris*,⁵ *Doe d. Garrod v. Garrod*,⁶ *Seale v. Barter*,⁷ and the doctrine to be found in all these cases, is summed up in *Lyne on leases renewable*.⁸

Whatever may be the construction put upon this will it is clear that the defendant in error is entitled to one fifth of the freeholds and of the life interest, the share of the eldest son who was born and died in that year.⁹ This son's share, if the estate devised was an estate for life, was taken by William Roddy, the heir at * 836 law of the testator; if * it was an estate in fee, one fifth went to the heir at law of the child, namely, William Roddy, to whom it belonged in any event, and who therefore had full power to dispose of it.

Mr. Napier replied.

THE LORD CHANCELLOR put the following questions to the Judges:—

1. What estate did William Roddy take under the will of Charles Roddy in the lands of Tanatygarman?

2. What estate, if any, did his issue take under the said will in the same lands?

3. What estate did John Roddy and William Roddy respectively take under the said will in the lands of Clinumphry?

¹ 1 Eq. Cas. Abr. 184, pl. 28.

² 5 T. R. 299.

³ Cas. Temp. Talb. 164.

⁴ 2 B. & C. 520.

⁵ 2 B. & Ad. 1.

⁶ 2 B. & Ad. 87.

⁷ 2 Bos. & P. 485.

⁸ Page 24, et seq.

⁹ This argument was rendered unnecessary by the decision, and is only referred to because it is mentioned in some of the opinions of the Judges in advising the House.

4. What estate, if any, did the issue of John and William respectively take in the last-mentioned lands?

5. Ought judgment to have been entered by the Court of Common Pleas for the plaintiff below as to all, or any, or what part of the lands of Tanatygarman and Clinumphry?

1858. February 15.

MR. BARON CHANNELL. — My Lords, the facts found by the special verdict, so far as they are material to be stated for the purpose of answering your Lordships' first four questions, appear to me to be as follows [his Lordship stated them]:

In the elaborate and (if I may be allowed to say so) the able judgment of Mr. Baron Greene given in the Court of Exchequer Chamber in Ireland, that learned Judge enumerates ingredients, five in number, as in his opinion united and found in the will of Charles Roddy. First, an express * estate for life to * 837 the first devisee. Secondly, an express remainder, given in express terms as a remainder, not to the heirs of the body, but to his issue. Thirdly, a remainder, not to the issue generally, but to the issue in shares as tenants in common. Fourthly, the explanatory word "child," as descriptive of the issue where only one. Fifthly, an estate in fee simple directly or by legal implication superadded to the limitation to the issue, so as to make them the stocks of distinct inheritances in fee originating with them.

The learned Baron adds, that though some of the decided cases have more and some less of these several conditions, none has all combined. He then proceeds to cite and comment upon many cases. Those cases, so far as I am aware, are all that bear upon the subject. I have carefully considered them. Without going through them, I humbly desire to express my entire concurrence in the judgment of Mr. Baron Greene as to the application and weight of those authorities, always, nevertheless, upon the assumption that the five ingredients in the will as explained by him are well established.

Fully admitting that the word "issue" is primarily to be considered a word of limitation, it is not, I conceive, necessary to cite at length authorities to show that the word "issue" is more flexible than the words "heirs of the body." But I would refer to the case of *Lees v. Mosley*,¹ and to the judgment of the Court of Ex-

¹ 1 Younge & C. Exch. 589.

chequer, as given by Mr. Baron Alderson, that though the *prima facie* meaning of a devise to issue might be to descendants of every degree, yet the authorities show not only that it would yield to the intention of the testator to be collected from the will, but

• 838 that it required a less demonstrative context to show • such intention than the words “heirs of the body” would do.

Thinking, then, the word “issue,” in the absence of any restraining context in the will, is to be construed as including descendants of every degree, but thinking also that the word may, and more readily and easily than the words “heirs of the body,” be restrained or explained by the context, I inquire whether in the present will there are such restraining words?

After an express devise to John Roddy “during his life,” the testator gives a remainder to John Roddy’s lawful issue, in such manner, shares, and proportions as he (John Roddy) may appoint, and in case of no such appointment, then to his issue “equally share alike,” and if “only one child, to such only child.”

It appears to me that the testator has in this devise himself translated the word “issue” in the remainder to the issue of Thomas and his issue, in this devise of Clinumphry, and that he has in the other devises of the other lands used words of similar import.

Assuming “issue” to mean children, then the devise should be read as a devise (of the lands of Clinumphry) to John Roddy for life, remainder to his children in such manner, shares, and proportions, as John Roddy should appoint, and in default to his children equally, share alike, and if only one child, to such child.

It is not, I think, disputed that if the devise to the issue would give them an estate in fee, then the first taker would take a life estate only. But it is said, and truly, that there are no words in the devise to the issue expressly giving them an estate in fee. Though there are no words expressly giving them an estate in fee, if the issue by implication take an estate in fee that is sufficient. It would then, I think, be immaterial that there is

• 839 a gift • over. *Montgomery v. Montgomery*; ¹ *Lees v. Mosley*; ² *Greenwood v. Rothwell*; ³ *Slater v. Dangerfield*.⁴

The inquiry, then, seems to me to reduce itself to this: Do the issue, by implication take an estate in fee? I agree with Mr. Baron

¹ 3 Jones & L. 47, 8 Irish Eq. 740.

² 1 Younge & C. Exch. 589.

³ 5 Man. & G. 628.

⁴ 15 M. & W. 263.

Greene that they do; but as this, the last of the five ingredients enumerated by him, has been strongly contested at your Lordships' bar, I think it right humbly to state to your Lordships the grounds on which I have arrived at the conclusion that the issue take by implication an estate in fee, always bearing in mind that if the testator has himself translated the word "issue" in the devise under consideration to mean "children," this interpretation must be borne in view throughout. I think that the power enabled John, the first taker, to appoint to his children in fee. *The King v. The Marquis of Stafford*.¹ If so, the gift, by the will to the children in default of appointment, by implication, cannot be less than what might have been appointed to them by the exercise of the power. *Crozier v. Crozier*.²

It is to be observed that the words of distribution are not confined to the power of appointment. Words of distribution are to be found in the devise (in default of appointment) to the issue, viz. "equally, share alike." These words are inconsistent with an estate in tail in the first taker, and such words of distribution applied to children ought not, I think, to be rejected unless by reason of other words indicating some paramount and governing intention of the testator which could never have effect unless these words were to give way; *Crozier v. Crozier*. I do not find in this will any such paramount or governing words.

* By construing the word "issue" to mean children, * 840 the devise to John as giving an estate for life, with power to appoint to his children in fee, by holding that in default of appointment the children take by implication an estate in fee, I give, as I humbly think, full effect to the language of the will construed in its ordinary sense. If I am to state what I consider to have been the general intent of the testator, I say it was to benefit his grandchildren, if any, by limiting the interest of his children, who are devisees expressly for life, to an estate for life, but with power of appointment and distribution amongst his grandchildren, if any, and in default of appointment to them in fee; but if there should be no such grandchildren, then over to Bernard and his heirs.

My answers to your Lordships' first four questions are as follows: To the first, that William Roddy took under the will of Charles Roddy, in the lands of Tanatygarman, an estate for life. To the

¹ 7 East, 521.

² 3 Drury & War. 373.

second, that his issue would under the said will take in the same lands an estate in fee. To the third, that John Roddy took under the said will in the land of Clinumphry an estate for life, and that William Roddy took an estate for life contingent on the death of John without children. To the fourth, that the issue of John (had there been such) would have taken an estate of inheritance in remainder, and that the issue of William did take an estate of inheritance in remainder contingent on the death of John without issue.

There is not, as far as I am aware, any case which, in my view of it, is opposed to the opinion which I have humbly submitted to your Lordships. Decisions upon the words "heirs of the body" do not, in my opinion, govern this case. My opinion is warranted,

I think, by the cases of *The King v. The Marquis of Stafford*, * 841 *ford, Lees v. Mosley*, * *Crozier v. Crozier, Montgomery v. Montgomery, Kavanagh v. Morland*.¹

Remembering that the learned Judges in Ireland were, upon the argument in the Exchequer Chamber there, equally divided in opinion, knowing the difference which, after hearing the full and able arguments at your Lordships' bar, and time taken to consider those arguments, prevails amongst the Judges who will to-day deliver their respective opinions to your Lordships, I need scarcely say that I have submitted my opinion in answer to your Lordships' first four questions with great diffidence and distrust as to its correctness.

It remains that I should give an answer to your Lordships' fifth and last question, viz. whether judgment ought to have been entered by the Court of Common Pleas in Ireland for the plaintiffs below, as to all, or any, or what part of the lands of Tanatygarman and Clinumphry.

To answer this question, other facts than those I have before adverted to must be taken into consideration.

The testator at the time of making his will had four sons, Bernard, William, Thomas, and John. Bernard was his eldest son and heir at law. Bernard died in the lifetime of the testator; on the death of the testator, William, his eldest surviving son, became his heir at law. John and Thomas died without issue after the death of the testator.

William married in 1835; he had one child in 1836, who died

¹ Kay, 16.

in that year; he had issue afterwards, the four defendants in the Court below, who are now the plaintiffs in error. As to the fee simple lands I have already stated that in my opinion the plaintiffs in error would, under the will, take a contingent estate in fee; but they were not, * nor was any child *in esse* in 1833, * 842 when in Michaelmas Term of that year the recovery in the special verdict mentioned was suffered. I am of opinion that the contingent remainder of the children in the fee simple lands was destroyed by the operation of that recovery; but that recovery did not include the freehold lands of Clinumphry.

Upon the death of the child of William Roddy in 1836, born in that year, the share of that child in the freehold lands, assuming such child to have taken an estate of inheritance, as I think he did, went to his heir at law; that heir at law was William Roddy. The legal estate in that share is, I think, vested in Robert Clifford, by virtue of the deeds in the special verdict mentioned; he has also, I think, the legal estate in the fee simple lands by virtue of the facts stated in the special case.

By an order of the Court of Common Pleas in Ireland of the 3d April, 1856, the judgment of that Court is to be a judgment that Robert Clifford only, not with Fitzgerald, do recover.

I answer your Lordships' last question by saying, that, as to the fee simple lands of Tanatygarman, and as to one fifth share of the freehold lands of Clinumphry the judgment of the Court of Common Pleas in Ireland, that Robert Clifford do recover, ought to be affirmed; and that, in my humble opinion, the judgment of the said Court as to the rest of the freehold lands ought to be reversed.

MR. BARON WATSON. — My Lords, in answer to the first question proposed by your Lordships to the Judges, I am of opinion that William Roddy took an estate tail under the will of Charles Roddy in the lands of Tanatygarman. This depends on the true construction of this devise. It is * necessary to * 843 construe the devise so as to give effect to the intention of the testator, to be collected from the terms of the will. From the use or misuse of legal terms, it frequently happens that an apparent intention cannot be given effect to according to the rules of law affecting the limitation of estates. And again, words are capable of being construed in two senses. It is for the Court to say in

what sense the testator's intention would be best fulfilled. The books are full of cases where two intentions are apparent on the face of the will, both of which cannot take effect, viz. a general intent and a particular intent; and, therefore, Courts have ascertained what is the general and paramount intention of the testator, and then construed the will so that particular intention shall give way to such general and paramount intention. This is one of the rules established for the construction of wills by a long course of decisions, and as much the law of the land as any part of our unwritten law. The terms of that rule have been much objected to of late, Hayes "Inquiry."¹ They may, perhaps, be better expressed according to the judgment of the Court of Queen's Bench in *Doe v. Gallini*.² "The more correct mode of stating the rule of construction is, that technical words or words of known legal import must have their legal effect, even though the testator used inconsistent words, unless these inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical words in their proper sense, and so it is said by Lord Redesdale, *Jesson v. Wright*.³ This doctrine of general and particular intent ought to be carried no further than this, and thus explained it should be applied to this and all other wills."

* 844 * This will of Charles Roddy was made on the 21st of September, 1817. On the 21st of November, 1821, the testator died. The particular devise is as follows [his Lordship read it].

The question is, whether the word "issue" is to be construed in this devise as a word of limitation, so that the well-known rule in *Shelley's Case* would apply and create an estate tail in William the first taker, or that the word "issue" is to be here construed as a word of purchase, so that the child or children of William would take an estate in fee.

Now, in the first place, there is the devise "to William Roddy during his life." If the will had stopped there, the devise would have been clear. It is equally clear that by the devise in default of appointment "to his issue," if these words stood alone according to the rule in *Shelley's Case* it would be an estate tail in William Roddy, for then the word "issue" would be construed in its

¹ P. 284, § 7.

² 2 Bligh, 49.

³ 5 B. & Ad. 640.

true and ordinary sense as synonymous to "heirs of the body." And again, by the words "in failure of issue," which properly mean on the indefinite failure of issue, an additional argument is added that the word "issue" must be in legal interpretation considered to be used in its ordinary sense, and that William took an estate tail.

All importance is attached in the construction of wills, Jarman on Wills,¹ and opinion of Vice-Chancellor Wood there cited, to a devise over on failure of issue. This construction applies forcibly in this case as to the successive devises to testator's sons, William, John, and Thomas, on the failure of their issue in succession; according to the rules of law it manifests an intention that the descendants of each son should be exhausted before it went over and * before the ultimate devise over to Bernard in fee * 845 should take effect. This appears to be the general and paramount intention of the will. In order to cut down the estate tail there must be shown another intent on the face of the will, equally strong as the general intent. The terms must be intelligible and manifest to countervail or override this general rule. It is clear that a power of appointment will not prevent this rule from operating. The particular form of the power in the present case I shall discuss hereafter.

Again, words of distribution, such as "share and share alike as tenants in common," or "equally," or the words "if only one child, then the whole to one child," will not control the effect of the word "issue," unless there be words of inheritance added to the word "issue," so as to carry the fee. The words of the will "for want of appointment to his issue equally if more than one, and if only one to said child," have no words of inheritance superadded, nor any word such as "estate," so as to constitute a devise in fee to the children, if there be issue. So that, if there was only one child, it would take for life, and this devise would exclude grandchildren from taking under the devise. The construction of the children taking a fee seems inconsistent with the devise over in fee.

The cases on this subject are numerous. The rule is clear. Lord Eldon observed very truly in *Jesson v. Wright*:² "The great judicial difficulty arises in the application of these rules to the words of each will. I cannot admit that all the cases have been well

¹ Vol. 2, p. 371, ch. 39.

² 2 Bligh, 50.

decided ; but it was hardly to be expected that all the Judges should agree in the decision of all the cases, for the mind is overpowered by their multitude and the subtlety of the distinctions between them." That case is the leading and binding authority on * 846 this * subject. There the devise was to William Wright for and during the term of his natural life, and from and after his decease unto the heirs of the body of the said William lawfully issuing, in such shares and proportions as he the said William by any deed or will should give, direct, limit, or appoint the same, and in default of such appointment, then to the heirs of the body of the said William lawfully issuing, share and share alike as tenants in common, and if but one child, then the whole to such only child, and for want of such issue, then there was a devise over in fee. On this it was decided that William took an estate tail. Lord Eldon, in delivering his opinion, held that there was a general and paramount intention that the devise over was only on the indefinite failure of issue, that the particular intent must give way to the general intent. In alluding to the power under such construction for the first taker to destroy both the general and particular intent, he says: "Whether it was equally wise to adopt such a rule might be a matter of discussion; but it has been acted on so long that it would remove the landmarks of the law if we should dispute the propriety of applying it to all cases to which it is applicable. However, it is definitely settled as a rule of law, that where there is a particular and general intent, the latter shall prevail, and Courts are bound to give effect to the paramount intent." The terms used in that will are nearly the same as in the present, with the exception, that the word "issue" is used in this will instead of the words "heirs of the body."

There is no doubt some difference between the word "issue" and the words "heirs of the body;" the latter words are more technical, and have, as technical words, a more defined legal signification than the word "issue"; but still the words "heirs of the body" may be construed to mean child or children, * 847 where a clear intention is shown * to that effect. The word "issue" is more flexible, but the general meaning is the same as "heirs of the body"; thus it was laid down by Rainsford, Justice, in *Warman v. Seaman*,¹ that the word

¹ Finch, 282.

"issue" is "*ex vi termini nomen collectivum*," and takes in all issues, to the utmost of the family, as far as heirs of the body would do.

Again, in delivering the judgment of the Court of Exchequer in the case of *Slater v. Dangerfield*,¹ Mr. Baron Parke said, "The general rule is clear and well established. The word 'issue' in a will *primâ facie* means the same thing as 'heirs of the body,' and is to be construed as a word of limitation; but this *primâ facie* construction will give way if there be on the face of the will an intention that the word is to have a less extended meaning." Similar observations will be found in the judgment of Lord Langdale, Master of the Rolls, in *Tate v. Clarke*.² It is clear also from the case of *Jesson v. Wright*, and many others, that the words "in default of issue," or "in failure of such issue," mean on the indefinite failure of issue, unless it is clear from the context of the will that they have a more limited meaning.

Jesson v. Wright also shows words of distribution, such as "tenants in common," or "equally to be divided," or "in case of one child, that child to take," without superadded words of inheritance, do not prevent the general rule taking effect. This was also decided in several cases: *Doe d. Blandford v. Applin*,³ where the devise was to A. for life, and after his decease amongst his issue, and in default of issue over; it was held to be an estate tail in A. In *Doe d. Cock v. Cooper*,⁴ devise to R. C., for the term of his natural life only, and after his decease to the lawful issue of R. C. as tenants in common, and if R. C. died without leaving lawful issue, devise over, was held an estate tail in R. C. So *Heather v. Winder*,⁵ devise to A. for life, and at her decease to her lawful issue, share and share alike; but if A. should die without lawful issue, then over, was held an estate tail in A.

From these cases it is clear that words of modification without words of limitation do not control the general meaning of the word "issue." From the above cases the first rule of interpretation on this part of the subject in Jarman,⁶ is the true and reasonable one, viz.: "Where words of distribution, but without words to carry an estate in fee are attached to the devise to the issue,

¹ 15 M. & W. 263.

² 1 Beav. 100.

³ 4 T. R. 82.

⁴ 1 East, 229.

⁵ 5 Law J., N. S., Ch. 41.

⁶ Vol. 2, p. 871 (2d ed. ch. 39).

and there is a gift over in default of 'issue' of the ancestor generally, or in default of such issue, or in default of issue living at the death of the ancestor, the ancestor takes an estate tail." This rule of construction, in my opinion, governs this case, and it is impossible to exaggerate the importance in such cases of abiding by general rules. In *Jesson v. Wright* there was a power of appointment antecedent to the devise to the "issue," but such power did not prevent the operation of the rule.

There is no doubt a difference in the terms of the power in the present case from that to be found in *Jesson v. Wright*; here the power is to "his lawful issue in such manner, shares, and proportions as William Roddy shall appoint." In *Jesson v. Wright* the words of the power were to the heirs of the body, "in such shares and proportions" as W. should appoint. It is extremely doubtful whether William Roddy under the power to appoint "in such manner, shares, and proportions" might have appointed in

fee; but supposing he could do so, it affords no argument

* 849 * that therefore there is an implication of an estate in fee in the children; indeed, if the power was so extensive as to sanction an appointment in fee, the devise is to be read to see what estate is given over in default of appointment, and that is to issue or child without any words of limitation; certainly the distinction raised on the word "manner" in one power and not in the other is a very refined distinction to take this case out of the general rule.

It has been considered that the case of *Crozier v. Crozier*,¹ is a decision to show that the word "issue" may be controlled by the extent of the powers of appointment, but it is really not an authority, as there was no devise over on failure of issue, on which Sir Edward Sugden laid stress; and it seems to have been necessary to carry out the only intent appearing on the will so to decide.

In the case of *Martin v. M' Causland* in the Court of Common Pleas in Ireland,² the will of Dorant M' Causland contained the words, "I give and bequeath to my son Robert, during the term of his natural life, all my estate, right, title, and interest of and to the lands of C., &c., and in case my son Robert shall marry with the consent of his mother (if living), then I devise the same to any issue he may happen to have by his wife, in such manner as he shall by deed or will direct, limit, or appoint, and for want of such

¹ 3 Drury & War. 373.

² 4 Irish, Law, 340.

appointment to go equally among them ; share and share alike ; but in case my said son Robert shall die without issue, it is my will my other lands shall go to my son Marcus and his heirs for ever." The Court held that Robert took an estate tail. That case is directly in point with the present,—the words "issue"

* with distributive words and a power of appointment in * 850 such manner as Robert should appoint. That case is not distinguishable from the present.

The case of *Doe v. Goldsmith*¹ is an authority in favour of my conclusion. In that case a devise to F. G. "for his natural life, to the heirs of his body, in such parts, shares, and proportions, manner and form as F. G. should appoint, and in default of such heirs of his body," over, was held to be an estate tail.

These authorities establish that this case falls within the rule as laid down in *Jesson v. Wright*, and upon that clear and broad rule this case ought to be governed without reference to over-curious refinements ; but I think all the distinctions do not take this case out of that rule, that "issue" should be construed in its ordinary and general meaning, and that the terms of the power do not control the legal acceptation of the terms used in the devise.

For these reasons I am of opinion that William Roddy took an estate tail in these lands.

For the same reasons, to the second question, I am of opinion that the issue did not take any estate under the said will in the same lands.

In answer to the third question I am of opinion that John Roddy and William Roddy respectively took estates in the nature of an estate tail in the lands of Clinumphy.

In answer to the fourth question, I am of opinion that the issue of John and William respectively did not take any estate in the last-mentioned land, and I am of opinion that the judgment ought to have been entered in the Court of Common Pleas in Ireland for the plaintiff below for all the lands of Tenattiggan and Clinumphy.

* MR. BARON BRAMWELL. — My Lords, in this case, from * 851 the nature of the question, from the character of the authorities, and from the difference of opinion in those whose opinion

¹ 2 Marsh. 517, 7 Taunt. 209.

is entitled to all respect, I need not say that I answer your Lordships' question with the greatest distrust as to my own correctness. What is to be ascertained is not, or ought not to be, what was the intention of the testator, but what is the meaning of the words he has used (per Lord Wensleydale, *Grey v. Pearson*¹). Not that I think there is any doubt as to what his intention was, nor do I understand that, in fact, any doubt is made by any one on the subject. He intended to give John Roddy an estate for life; he intended not to give him more; he intended that on John's death his children should take the fee in equal shares, subject to a power of distribution in him among them. If there was no one to take under this devise, then he intended William Roddy should take for life, after him his children, as he had intended John's should, and so on for Thomas and his children. This was his intention, I doubt not. He did not intend that if a child was born to William Roddy and lived a few hours, that such child should take so as to confer a title on his heirs; and I doubt not there are many other possible conditions of things that he did not intend, not because he intended the contrary, but because he had no intention on the subject, because he had not contemplated the case arising. It is a great mistake to suppose a person must intend the negative of whatever he does not intend the affirmative. When this common mistake is considered, the value of Lord Wensleydale's remark above cited is even more apparent.

Then what intention has he expressed in the words he * 852 * has used? Now, in words he gives William an estate for life, and he gives him no more; and as he could have done so, had he thought fit, it ought not to be held that he has done so, unless on some strong ground of convenience or authority. But he proceeds, that after William's death he gives the estate to his issue, subject to his appointment among them, or if no appointment in equal shares; and it is impossible that can be, if William took an estate tail.

It was urged that the general intent shall prevail over the particular intent. It was asked by the Lord Chancellor on the argument, what was the general intent? If I had to say what was the testator's general intent, I should say it was to benefit his children and grandchildren, and to insure that object by giving his children estates for their lives only, with no power of preventing the grand-

¹ 6 H. L. Cas. 61, 106.

children from taking what was intended for them. But to give his sons estates tail is inconsistent with this general intent, as it enables them to defeat the estates of the grandchildren, a matter not improbably known to the testator.

If, then, the question was *res integra*, I could have no doubt on it ; but I agree, if the authorities are the other way, they should be abided by. I cannot find that this is so ; and I invite your Lordships' intention to what Mr. Baron Green in his judgment calls the five peculiar ingredients in this case, and his examination of the authorities. It is in vain to cite and attempt to reconcile or distinguish them ; at all events I cannot hope to do it with any advantage after that able judgment. I may say, however, that it appears to me that *Jesson v. Wright*,¹ the nearest case to the present in favour of the construction contended for by the defendants in error, is distinguishable from this, as there the words used were "heirs of the body," which includes * child and grand- * 853 child, here the word is "issue," which is shown to mean children by the use of the word "child" as an alternative. Then it is admitted that a power to appoint lands "in such manner, shares, and proportions as he shall think fit," gives a power of appointment in fee. But I cannot doubt that the devise in default of appointment is a devise of the same estate as might have been appointed, viz. an estate in fee, and consequently that the dying without "issue" means such issue, viz. children, and does not point to an indefinite failure of issue. I think, therefore, that the expressed intention was, that William Roddy took an estate for life only. I think that that effectuates the general intent, or supposed general intent, and I think this construction is warranted by the authorities.

If this is wrong, it has at least the advantage of being wrong on the right side. I am fully sensible of the value of abiding by authority ; but it is impossible that with such authorities as exist on the present subject the law can ever be settled. They are based on the fundamental error of disregarding expressed intention in favour of some supposed unexpressed general intention. They are in many cases decided as we find them, owing to a rule of construction now abrogated by Statute 7 Wm. 4 & 1 Vict. c. 26, § 29, and their soundness is doubted (see *Jesson v. Wright*, per Lord Eldon, and *Kavanagh v. Morland*, per Wood, V. C.)²

¹ 2 Bligh, 1.

² Kay, 16, 26.

I answer your Lordships' questions thus :—

1st. I think William Roddy took an estate for life under the will of Charles Roddy in the lands of Tanatygarman.

2d. I think his children took estates in fee under the will in those lands.

* 854 * 3d. I think John Roddy and William respectively took estates for life under the said will in the lands of Clinumphry.

4th. I think their issue respectively took the whole interest therein under the will.

5th. I think judgment ought to have been entered by the Common Pleas for the plaintiffs there for all the lands of Tanatygarman, and one undivided fifth of Clinumphry ; for the residue for the defendant.

MR. JUSTICE CROMPTON. — My Lords, I find in this will a very strong intention that the issue of the respective sons of the testator should take an estate as purchasers among themselves distributively, and not in succession either through the power or under the direct devise to them if the power was not executed. I find also a very strong intention that the estate should not go over from the line of each respective son until that line should have become exhausted. Except for the use of the word "manner" in the power, and the use of the word "issue" instead of "heirs of the body," the present case is identical with that of *Jesson v. Wright*, a decision of the highest authority, with which I presume no one would think of interfering. The word "issue" is however admitted to be a more flexible expression than that of "heirs of the body," and though to be taken *prima facie* as a word of limitation, it is capable of being taken as a word of purchase in certain cases.

I think that the authorities show that in cases of the present description the question whether the word "issue" is to be construed as a word of purchase or of limitation depends on the question, whether an estate of inheritance is or is not given to the issue: Jarman on Wills.¹

* 855 * If in such cases there are words which will carry a fee to the issue, they take the property amongst them in fee, and no estate of inheritance is given to their parent ; but if the

¹ Vol. 2, ch. 38, § 39.

words would not give a fee to the issue distributively then the word "issue" is to have its ordinary technical sense.

I think it immaterial for the present purpose whether the fee is given expressly or by implication. It seems to me that whether the fee is given directly to the issue as purchasers by apt words of limitation to their heirs, or whether it is given by words implying, according to the rules of law, the intention that they should have the fee, the effect will be the same, as it is the vesting of the fee in the issue, and not the words by which it is vested, that prevents the necessity of implying the estate tail in the parent for the purpose of carrying out the intention that the estate should not go over until the exhaustion of the particular line. Accordingly, I am quite satisfied with the proposition that in such cases no estate tail is to be implied in the parent, but the fee is to be considered as vesting in the issue whether the words giving the fee are direct words of limitation, as "to the issue and their heirs," or whether the fee can be held to be vested in them from the use of such expressions as "estate, &c., &c.," or by implication from a power to appoint the fee to them; but it is still necessary for the purpose of vesting such estate in the issue that there should be some such words or necessary implication as, in the construction of a will, can by the rules of law vest the fee in the issue.

Thus, where there is a power to appoint in fee amongst issue, explained by the context to mean children, and a devise over in default of such issue, meaning children, there may in some cases be an implication of an estate in fee amongst the children, there being no express devise to them; and accordingly Mr. Jarman's book so states it in the passage I have already referred to.

* In the present case the estate to the issue does not * 856 arise by implication, but there is an express devise to the issue in default of appointment under the power, the testator directing in so many words to whom the estate shall go in that event.

In Sugden on Powers,¹ it is said: "Where there is a gift over in default of appointment to the objects of the power, or to other persons, of course the words of the power cannot operate to vest any estate in the objects of it by implication if there be no appointment." And Mr. Jarman, treating of the same subject,² says: "An express gift over in default of appointment in favour of either

¹ P. 167, c. 10, § 6, pt. 25.

² Vol. 1, p. 462 (2d ed.).

the objects of the power or of any other person of course excludes all implication"; and he adds, that "There is, it seems, no necessary inference that the testator intends that a qualification applied by him exclusively to the objects of the power should be extended to the objects of the gift, expressly limited in default of appointment to a class of objects identical in other respects with the objects of the power"; citing in support of the proposition, the case of *Smith v. Death*.¹ Indeed the general rule of *Expressum facit cessare tacitum*, seems plainly to exclude any increase of an estate by implication where there is an estate expressly limited, as in the present case.

The devise to the issue being here express, the question is whether there are words sufficient to carry out what perhaps may have been the intention, that the issue should take an estate in fee. In *Crozier v. Crozier*,² the devise was to I. C. for life, and from and after his decease, to the issue male and female begotten or to be begotten on his then wife, to be divided between and amongst them in such manner, shares, and proportions as the said I.

* 857 C. * should by will appoint. There was no express devise to the issue in default of appointment, as seems to have been supposed in *Kavanagh v. Morland* as reported in the *Law Journal*,³ and an estate was necessarily implied in them, which, as the power to appoint would have authorised an appointment in fee, and as there was a charge during the continuance of the estate upon the party taking, was properly held to be an estate in fee.

In the present case the testator gives a power to appoint, which would authorise an appointment in fee, and if no express estate had been devised to the issue, the fee might possibly have been properly held to vest in them by implication; but there being such express estate, the question is, whether under the settled rules of law as to the construction of wills before the Statute of 1837, the words of this express devise are sufficient to carry the fee to the issue. Here we have no words of limitation giving the inheritance to the issue, and no words descriptive of the quantity of estate, or imposing any pecuniary charge upon the issue, which would have the effect of passing the fee. And the estate is not to arise by implication, but is expressly given to and amongst the issue without

¹ 5 Madd. 371.

² 23 Law J., N. S., Ch. 43.

³ 3 Drury & War. 373.

any words of limitation. The words of the power are not at all mixed up with the devise to the issue, which has been thought of importance, but the power, and the estate limited in default of appointment, are perfectly distinct.

No authority was cited which satisfied me that there is any sufficiently expressed intention in this devise to make the express estate to the issue an estate in fee. In the case of *The King v. The Marquis of Stafford*,¹ it was said, that if the power of appointing had been in tail only, it might have been an argument for thinking that an express * estate in fee should be cut * 858 down to an estate to heirs of the body, but in that case there were words sufficient, according to the rules of law, to give an estate of inheritance. It does not seem by any means a necessary inference from a power under which the donee of the power may appoint either for years or life, or in tail or in fee, that the testator means an express estate, limited over in default of appointment, followed by other limitations, to be an estate in fee. It is by no means an impossible scheme of the testator's to attempt to give life estates preceded by a power to the father enabling him to alter such estates, and increase or diminish them. It is at most a guess, that his intention is to give a fee; and I think that we are not at liberty, on such a guess, to increase the estate devised to the issue to a fee in the case of a will made before the Wills Act of 1837. I treat the case as one of those of such frequent occurrence before the Wills Act of 1837, in which the probable intention of the testator to give a fee failed for want of apt words of limitation or other technical words, and where the courts were compelled to hold the estate a life estate only for want of such words, though there was quite as strong a reason to guess that the intention of the testator was to give the fee, as in the present case.

If the children do not take a fee, it seems necessarily to follow, from the rules and authorities on the subject, that an estate tail must be implied in the parent to carry out the clear intention that the estate should not go over to the next brother in the prescribed order of succession until the whole line of the particular son is extinct.

Assuming that it is necessary that the sons should take estates tail in order to carry out the clear intention of the testator, that the estates should not go over until the general failure of issue of

¹ 7 East, 521.

each son, I have entertained considerable doubt, from which

* 859 I am not yet altogether free, whether * the intention of the testator might not be best carried out, as far as the rules of law will admit, by holding that the sons of the testator, instead of immediate estates tail, took estates tail after the estates for life respectively limited amongst their issue, according to the authority of *Parr v. Swindles*,¹ and the cases of that class; in other words, that they took estates tail in remainder after, instead of in derogation of, the estates for life limited to their respective issue. The expressions in the will are strong to show that the testator used the word "issue" in the sense of children, and if so, there is a strongly expressed intention that they should take as purchasers. And there is also the intention that the estate should not go over till the failure of the particular line.

It occurred to me, that unless it should be absolutely necessary that one of those intentions should be sacrificed, both should be carried out as far as possible, and that the will might possibly be construed so as to carry out both these intentions, and so as to avoid sacrificing the very clearly expressed intention that the issue should take some estate as purchasers. According to such construction, the result would have been that the parent would take for life with contingent remainders to the unborn children as tenants in common for life, probably with cross remainders amongst them for life, according to the doctrine in *Jarman*,² with remainder in tail (after such life estates) to the parent, and then over to the brother next in succession, with similar remainders for life amongst his children and in tail to himself, with ultimate limitation after the failure of all the estates tail to Barnard, the eldest brother, in fee.

This construction would have given effect to the devise of the express estate to the son for life, to the devise of the

* 860 * lands without legal words to carry the fee distributively amongst the issue, to the strong intention that the issue should take together and not successively, and that they should take as purchasers, and at the same time would prevent the estates going over until the failure of the issue of each particular son. The result of this construction would have been, that the life estates of the children who were all born before the conveyance of 1847, would have been existing estates, enabling them to succeed in the present ejectment.

¹ 4 Russ. 283.

² Vol. 2, p. 471, 472 (2d ed.).

There are, however, several objections to this construction, and the cases in which it has been adopted (*Parr v. Swindels*, *Doe v. Gallini*, and *Doe v. Halley*,¹ are all cases where the word "issue" was not used, but the words were children, sons, or some expression of that nature; and upon the whole it seems to me, that the real question in the present case is on the construction of the word "issue" where it first occurs in each limitation, and whether, according to the rules established by modern authorities, that word is to be construed as a word of limitation or of purchase; and thinking that this must turn on the question whether the issue can take by the rules of law more than a life estate, and that they cannot do so under the express limitation to them, I am of opinion that the word "issue" must be taken in its ordinary technical sense as a word of limitation, and the case then falls within the distinct authority of *Jesson v. Wright*, and I accordingly answer your Lordships' questions by saying, that in my opinion, the sons of the testator took estates tail, and *quasi* estates tail in the respective lands in question; that the respective issue took no estates; and that the judgment of the Court of Common Pleas in Ireland was right as to all the lands in question.

* MR. BARON MARTIN. — My Lords, I beg to be excused * 861 from giving an opinion on this case. I was one of the plaintiffs in the case, *Martin and Others v. MacCausland*; and in the event of the judgment in the present case being reversed, a writ of error will probably be brought in the case in which I am personally interested.

MR. JUSTICE WILLIAMS. — In answer to your Lordships' first question, I have to state my opinion, that William Roddy took an estate tail.

On consideration of the whole of the will of Charles Roddy, the testator appears to me manifestly to have had a pervading and predominant intention, that on a general failure of the issue of each of his younger sons, the estates respectively should pass to the others, and that they should not go to his eldest son Bernard until there should be a general failure of issue of all the other sons. If this be so the law has long been settled that the testator must be deemed to have intended to give each younger son an estate tail;

¹ 8 T. R. 5.

and that if he did so intend, any inconsistent wishes which the testator has also expressed, such as that his sons should only take life estates, or that the issue should take as joint tenants or as tenants in common, must give way, and cannot be carried into effect.

The real question which arises on the construction of this will appears to be whether there is any thing on the face of it to show that the word "issue," which *prima facie* is a word of limitation, and means the same thing as "heirs of the body," was intended in this devise to have a less extensive meaning, and to be used only to signify "children."

Two grounds of argument have been mainly relied on in support of this proposition: first, that the testator by providing that * 862 the estate for want of appointment shall go to * the issue of the first taker equally if more than one, and if only one "child" to that "child," has in effect himself translated the word "issue" to mean "children"; and, secondly, that there is language in the will which is sufficient to constitute a limitation in fee to the issue.

The former of these grounds is rendered untenable by the decision of this House in *Jesson v. Wright*. In that case the terms of the devise were precisely the same as those of the present, with two exceptions only; the first, that the words of the devise in *Jesson v. Wright* were "heirs of the body," instead of the expression "issue," in the present will; the other, that the word "manner," which is to be found in the power of appointment given in the present will, is not to be found in the power of appointment contained in the will in *Jesson v. Wright*. I therefore concede that, although the authority of that case governs the present as to the former of the two grounds of argument to which I have adverted, it has no direct application to the latter.

With reference to this latter contention I do not propose to controvert the general proposition laid down in Mr. Jarman's "Treatise on Wills," and supported by the opinion expressed by Vice-Chancellor Wood in *Kavanagh v. Morland*,¹ viz. that "Where words of distribution, together with words which carry an estate in fee, are attached to the gift to the issue, the ancestor takes for life only; and that the rule is the same whether the fee be given by the technical words 'heirs' or by such words as 'estate' occurring in the description of the subject of the gift; and whether the

¹ Kay, 16.

gift to the issue be direct or by implication from a power to appoint to them ; and whether there is a gift over on general failure of issue of the ancestor or not." For I think it difficult to deny that where an intention appears on the * will to give * 863 the issue a fee, the word " issue " may well be construed to mean " children " throughout the devise, and be regarded as a word of purchase, and the gift over " on failure of issue," to mean " on failure of such issue," i. e. " children." But I cannot find any language of the testator in the present case which will carry a fee to the issue. The argument is that the word " manner " in the power authorised the appointment to be made in fee, and that, consequently, by implication there is a gift of an estate in fee to them in default of appointment. It is not in my opinion necessary to consider whether in this particular will the word " manner " would have authorised an appointment in fee. For even assuming that it would, why should it follow that the issue are to take in fee in default of appointment by the ancestor, or take any other or different estate than that which the will expressly says they shall take for want of such appointment ? The words of gift in that event are simply " to his issue equally if more than one, and if only one " child, to said child."

I am not aware of any authority or of any principle justifying the extension of these words, which according to general rules of law (in the case of a will to which the new statute of wills does not apply) carry only an estate for life, into a gift in fee, merely because the unexecuted power would have authorised an appointment in fee.

The case of *Rex v. Lord Stafford*,¹ which has been supposed to be an authority for such a doctrine, is really quite inapplicable, because in that case there was an express limitation in default of appointment to the children and their heirs. Again, in *Crozier v. Crozier*,² which was also cited for the same purpose, there was no express gift in default of appointment.

* Another obstacle occurs to adopting the construction * 864 that the gift is to the children in fee as purchasers, viz. that on that construction the power of appointment must necessarily be confined to children ; so that if the issue of William Roddy, when he came to exercise the power, should have consisted of a single child, and the children of several deceased children, he

¹ 7 East, 521.

² 3 Drury & War. 373.

must have exercised the power exclusively in favour of the single surviving child ; which it is difficult to suppose could have been the intention of the testator when he conferred on his son William the power to appoint to his lawful issue.

On the whole, therefore, I am of opinion there is nothing in this will to lead to the conclusion that the word " issue " means any thing different from the expression " heirs of the body," and, consequently, that this case is not materially distinguishable from *Jesson v. Wright*, and, therefore, that William Roddy takes an estate tail in the lands of Tanatygarman.

It follows, that in answer to your Lordships' second question I should state my opinion that his issue took no estate ; and in answer to the third, that John Roddy and William Roddy respectively take an estate tail in the lands of Clinumphry ; and in answer to the fourth question, that their issue take no estate in the last-mentioned lands ; and in answer to the last question, that judgment ought to have been entered by the Court of Common Pleas for the plaintiffs below as to all the lands in question.

MR. JUSTICE ERLE. — My answers are, —

1st. William Roddy took an estate for life.

2d. His issue took a remainder in fee.

3d. John and William Roddy took for life respectively.

4th. Their issue took a *quasi* remainder in fee.

* 865 * 5th. The judgment ought to have been entered for the plaintiff for Clinumphry, and not for Tanatygarman.

The five answers are in effect one, as they all turn upon the word " issue." Did the testator mean thereby children or descendants ? The meaning is to be ascertained by the context, and the circumstances and judicial decisions. As the estate of Clinumphry is alone in judgment here, I take the words devising that estate, which are — [his Lordship read them].

If " issue " is construed to mean " children " throughout this devise, and if the devise is construed to give to John for life, with power to appoint to the children in fee, remainder to children in fee, remainder over, every word of the devise will have effect according to its ordinary meaning, and to judicial decisions, and the disposition of the property will be consistent with rational affection, and the law governing devises of land. The words creating the life estate are unequivocal ; the power given by the

owner of the fee to appoint in such manner as the donee may choose, is, in ordinary meaning and according to judicial construction, a power to appoint in fee, *The King v. The Marquis of Stafford*,¹ and *Crozier v. Crozier*,² and a distribution in equal shares in default of appointment is a distribution of that which might have been appointed, which in this case was a fee, the remainder, therefore, is to the children in fee by implication from the estate devised, without words of limitation.

It is consistent with rational affection for a father to secure an estate to his son for life, and to his son's family after him, subject to parental control by appointment, and in default thereof in equal shares, and it is consistent with the law governing devises of land to secure it for a life in being, and to one generation after.

* The testator had no preference for primogeniture, and * 866 no intention of centering all his land in one owner to found a family, as both the objects of his bounty are younger children, and his land is divided between two owners for life, to be subdivided among their families afterwards.

Although this construction might defeat an intention, which, perhaps, the testator might have expressed if his mind had been directed to some contingencies, yet it is practically impossible to provide for every contingency, and the construction above proposed, securing an estate for life with a power of appointing in fee to children remainder over, makes a more reasonable provision for every contingency than any other construction now contended for.

I do not cite the authorities, as they are fully examined by Mr. Baron Greene in the Court below, and it would be useless to transcribe from him what cannot be improved by me. The summing up of the authorities is given in *Jarman on Wills*.³ I cite this passage to show how this eminent writer understood the law to be settled, and so to remove the objection that this construction will shake titles and unsettle the law, an objection which is a mere *petitio principii*, assuming that which is to be proved.

But if "issue" is construed to mean "descendants," and the words, "in case of John dying without issue," mean in case of a general failure of issue of John, so that an estate tail is implied in John, in a technical sense the general intention will be effected, but in practical truth every intention, general and particular, will

¹ 7 East, 521.

² Vol. 2, p. 371. See ante, p. 848.

³ 3 Drury & War. 373.

be defeated ; the testator will be taken to have preferred unborn objects of unknown distance to living objects of natural affection, and to have attempted a devise which the law does not allow.

The words giving the estate for life, the power, and the * 867 distributive * remainder are annulled. "Issue," which in the first part of the devise, is declared by the testator to be synonymous with "child," a term of purchase, is construed to be "heirs of the body," a term of limitation ; and though there is a possibility that the heirs in tail may take, yet, as any tenant in tail can disentail and take the fee, the security for the issue is illusory. These are the reasons for the construction on which my answers are founded.

MR. JUSTICE COLERIDGE. — My Lords, I have found it extremely difficult to bring my mind confidently to any conclusion as to the answer which I ought to give to the questions propounded to us. It seems to me impossible, at least I have found it so, to reconcile all the decisions which have been cited in the argument before the House, or to come to any conclusion upon the devises in question which shall satisfy the whole language used by the testator. In this difficulty I know no better rule to act upon than to ascertain, as well as I can from the will itself, the general predominant intention of the testator, and to sacrifice such parts as irreconcilably clash with that. This rule stands upon undoubted authority, and upon the soundest common sense ; it is what it may well be supposed that any reasonable testator would do for himself in reading over his own will, if the conflict were pointed out between the different parts of what he had written ; and although Courts of law do not stand exactly in the place of the testator when they are construing, not making, his will, yet they are driven by necessity (and it is necessity only which justifies them) to this course, when it is only so that effect can be given to that which is clearly seen to be the main object of the testator in the scheme of his will.

Now it seems to me quite clear that, not only as to the * 868 * ultimate gifts over to Bernard, but also as to what I may call the several divisions and subdivisions of the will, the testator intended nothing to pass from the line of one son to another, except on entire failure of issue of the first taker, and so of the successive takers. This, then, is the effect which we must

seek to give to the will, if it contains words sufficient for the purpose; and the first inquiry is, whether there are such words, that is, words sufficient of themselves, and apart from the consideration whether there are not other words which seem to clash with them, and indicate some subordinate intention irreconcilable with it.

Now, to take the devise to William Roddy, on which your Lordships' first question turns, as a specimen. There is, first, a direct devise to him for life, and, after some intermediate provisions, of which I will speak presently, on failure of issue, a gift over to John. If this was all, there could not be the least question but that William took an estate tail. But then must be considered the intervening provisions; they are these: "After his death — [his Lordship read the words]; upon these words it is argued that "issue" is in itself a word of variable import, and is here translated by what follows, and shown to mean "child or children," which are words capable only of one meaning, and, therefore, that in effect this is an estate in remainder to William's children or child, and that they or he take by purchase, and so William's estate is only for life.

Two remarks may be made on this: the first, that the words "child or children" are not, under all circumstances, of one meaning only, but will be translated into "issue" or "the heirs of the body," if the devise cannot otherwise be effectuated, as in the case of a gift to A. and his children, or his male children, where he has no children born at the time; or, according to the observation of Lord *Eldon, in *Jesson v. Wright*,¹ the word * 869 "child," following on the words of distribution among the issue, might operate as a description of the person, and would not conclusively prove that estates tail were not intended to be given. These considerations, in some measure, diminish the weight of the argument drawn from the use of the word "child." But, secondly, these words must be considered in connection with those which follow, and which determine in what event the estate is to go over to John. Now, if we read "issue," where first used, as meaning "children," and, in default of appointment, give them an estate for life, as the words in themselves import, or, from the terms of the power of appointment, imply an estate in fee to them in default of appointment (which implication, I may say in pass-

¹ 2 Bligh, 1.

ing, I am by no means satisfied we are at liberty to make), equally, though in different ways, the devise over will be liable to be defeated. But this would be to offend against a perfectly established rule of construction, and to sacrifice the general to a particular intent of the testator.

It appears to me, I own, that this case is governed by *Jesson v. Wright* in this House; there was an express devise for life to William, after his decease a gift to the heirs of his body, in such share and proportions as he should appoint, and for want of appointment, to them share and share alike as tenants in common; if but one child, the whole to such only child, and for want of such issue over. Substitute the word "issue" for "heirs of the body," and the two cases are, for the present purpose, identical. There, as here, it was contended that the use of the words "if but one child, the whole to such only child," showed what was * 870 meant by "heirs of the body" preceding, and "such issue" following them, and all the difficulties as to distribution among the heirs of William, as tenant in tail, were pressed as they have been here, but the House overcame these difficulties. I do not repeat the arguments used, or the authorities cited, in that case, which are familiar to your Lordships. It seems to me very undesirable to fritter away the importance and utility of great leading cases such as this by yielding to minute distinctions. I therefore answer your Lordships' first and third questions by saying that, in my opinion, William, John, and William take respectively estates tail in the lands mentioned in those questions. My answers to the second and fourth questions follow from this as a matter of course; and it follows also, if I am right, that the judgment of the Court of Common Pleas in Ireland was rightly entered for the defendants in error.

1858. April 17.

LORD CRANWORTH. — This case arose upon a writ of error from a judgment of the Court of Exchequer Chamber in Ireland; the sole question which your Lordships have to consider is, whether or not that Court, or rather the Court of Common Pleas (because the Judges of the Court of Exchequer Chamber were equally divided in opinion, and therefore the judgment of the Court below prevailed), was right in determining that according to the correct construction of the will an estate tail was created. — [His

Lordship here stated the facts, and read the devise to John Roddy.]

With regard to the fee simple lands no question really arises, because I think the point was abandoned in the arguments at the bar, or if not, your Lordships expressed a very clear opinion that there was no doubt with respect to those lands, because there had been a recovery suffered * which, if William. * 871 Roddy did not take an estate tail, operated as a bar of the contingent remainders, and therefore no question could arise as to those lands. But with regard to the lands of Carrigans and Clinumphry, it became necessary to consider whether what the testator gave amounted to an estate tail, or that which in the case of fee simple lands would be an estate tail; whether what he gave constituted, for want of a better word, what may be called a *quasi* estate tail, or an estate for life. That is the sole question your Lordships have to determine.

I must begin by saying that the decision of these cases is never very satisfactory, because one cannot but feel that the real intention which the testator had in view is very frequently defeated instead of being carried into effect. But the duty of the Court is only to interpret the language of the will, attending to certain well-known rules or canons of construction. Where the testator shows upon the face of his will that he must have used technical words in another than their technical sense, there is no rule that prevents us from saying that he may be his own interpreter. So any established course of construction must give way to a contrary intention plainly apparent upon the face of the will. But unless there is something apparent upon the face of the will to the contrary, technical rules and ordinary canons of construction must prevail.

Here a life estate is given, with remainder, to the issue, share and share alike, if only one child then to that child, and in case the tenant for life dies without issue, then over. If there is a devise to one for life, with remainder to his issue, and if he dies without issue, then over, the devisee takes an estate tail, for it is manifest that the gift over is in such case only to take effect if there is a general failure of issue of the first taker, and "issue" in such a case has the * same meaning as "heirs of the body." * 872 The word "issue" when it is used in a will is *primâ facie* a word of limitation; that is to say, a gift to A. B. and his issue,

gives him an estate tail, it is the same as a gift to him and the heirs of his body. But if the context makes it apparent that the word is not so used, then it may be treated as a word of purchase.

The real question is, whether it is apparent on the face of this will that the word "issue" has been used in other than its extended sense as a word of limitation? It is argued that this does appear upon the face of the will, first from the power of appointment, secondly from the qualification that the issue were to take share and share alike; and thirdly, from the fact that if there is only one child then that one child is to take all, and only in the event of his having no child, does the estate go over. It is said that that shows that the word "issue" must mean "children" not issue generally.

I have considered the case very attentively, and your Lordships have had the assistance of the opinions of the learned Judges, and I have come to the conclusion that there is not sufficient upon the face of this will to give to these words any other than their ordinary technical meaning. The direction that the issue shall take as tenants in common, shows it is true that the testator did not contemplate the regular course of descent; but that only proves that he had an intention which cannot be carried into effect. He had two intentions, one that the gift over should not take effect till all the issue of the first taker was exhausted; the other, that the issue should take not in the ordinary course of descent. All the authorities say that in such a case the latter intent must give way, they cannot stand together.

*873 *The power of appointment does not vary the case, it only shows that the testator did not contemplate equality of interests as essential.

So neither is the case varied by the use of the word "child" in the phrases "if more than one child," "if only one child," and "said child." He certainly meant that, if there was only one child, that child should take. But that the child would do consistently with the intention that the estate should go to the issue, through all time, of the first taker.

It was argued that here the word "issue" must be taken to have been used as a word of purchase, because by a fair construction of the clause, the issue in default of appointment were to take the fee. And in cases of this description where an estate in fee is

given to the issue, there the Court has construed the gift over in case the first taker dies without issue, as a gift over in case he dies without such issue, that is, without having had a child. But the ground on which these cases have rested, fails here. It is impossible to say that this gift to the issue in this case could carry the fee. There are no words of limitation superadded as there were in the case of *The King v. The Marquis of Stafford*,¹ and therefore, as this will was made long before the passing of the late Wills Act, the issue would only take, if they were purchasers, life estates.

I do not forget the argument that, as there was a power of appointment, which, from the terms in which it is framed, would, it was contended, enable the tenant for life to appoint the fee, therefore it must have been the testator's intention that the parties taking in default of appointment should take in fee. This reasoning, however, fails to convince me, since the tenant for life, if he might have * appointed in fee, might also have appointed * 874 in tail, or for life, or for years. And I see no connection between the quantum of estate which the donee of the power might have appointed, and that which the objects of the power were to take if no appointment was made.

I have therefore come to the conclusion, with the majority, though a very narrow majority of the learned Judges whose valuable assistance we have had, that the judgment below was right and ought to be affirmed, and I am glad to arrive at this result because this case is hardly to be distinguished from *Jesson v. Wright*,² which was decided by this House nearly forty years ago, and in which case Lord Eldon and Lord Redesdale were clearly of opinion that the first taker took an estate tail, and that case has been considered as a leading authority ever since.

My Lords, in that case the will was this: "I give and bequeath unto William, one of the sons of my sister Ann Wright, before marriage, all that messuage" and so on, to hold the same during the term of his natural life, and from and after his decease I give the same to "the heirs of the body of the said William, son of my said sister Ann Wright, in such shares and proportions as he, the said William, in and by any deed or writing, or by his last will and testament shall appoint, and for want of such gift, direction, limitation, or appointment, then to the heirs of the body of the said William, share and share alike, as tenants in common; and if but

¹ 7 East, 521.

² 2 Bligh, 1.

one child, the whole to such only child. And for want of such issue, I give and devise all the said dwelling-houses, and so on, to my right heirs." The only difference between the two cases unfavourable (if it be unfavourable) to the defendants in error is, that there the devise was after the death of the first taker, *875 not to his issue, but to the heirs of his body. * There were the same power of appointment, the same direction that in default of appointment the heirs of the body should take in common, the same direction that if there should be only one child, that child should take the whole, and the same gift over for want of such issue. Now if the terms of that devise had been sufficient to show that by the words "heirs of the body" the testator meant "children," there is no rule of law which would have prevented the Court from adopting that construction. But it was decided by this House that no such inference arose, that the provisions in question were not sufficient to prevent the operation of the rule; which, if no such provisions had existed, would have given to the first taker an estate tail. I think that the decision there must govern the present case, for I see no real distinction in the circumstance that in this will the word is "issue" and not "heirs of the body." *Primâ facie*, the word "issue" used as it is in this will has the same meaning as the word "heirs of the body," and provisions which are insufficient to cut down and restrain the meaning of the words "heirs of the body" must be also insufficient to qualify or alter the effect of the word "issue."

It is in these cases to the last degree important to have a settled rule of construction which may make it possible to advise confidently on titles, and this object cannot be attained if from any speculation, as to what the testator may have had in his mind, we endeavour to raise distinctions between decided cases and those under consideration where no real distinction exists. This case is substantially the same as that of *Jesson v. Wright*, and must, in my opinion, be governed by it.

*876 * LORD WENSLEYDALE. — Your Lordships are placed in the very singular position of having to decide this case upon the argument of which, in the Irish Court of Exchequer Chamber, the ten Judges present were equally divided, and the eight English Judges who heard the argument at your Lordships' bar, and have delivered their opinions would, I believe, have been equally divided

also, if Mr. Baron Martin had not been prevented by the reason which he assigned from giving his opinion. No such difference of opinion, I believe, exists among your Lordships.

It is satisfactory to find that the difference between the Judges does not arise upon any proposition of law. But in the application of the established rules for the construction of wills, and all other written instruments, even where these rules are correctly and properly applied, the forms of language are so various, and strike the mind of each reader so differently, that it is not surprising that uniformity of opinion should not prevail. Much also depends on the manner in which these rules are applied, and in proportion as these are faithfully acted upon, differences will diminish.

These rules are perfectly plain and clear. The first duty of the Court expounding the will is to ascertain what is the meaning of the words used by the testator. It is very often said that the intention of the testator is to be the guide, but that expression is capable of being misunderstood, and may lead to a speculation as to what the testator may be supposed to have intended to write, whereas the only and proper inquiry is, what is the meaning of that which he has actually written. That which he has written is to be construed by every part being taken into consideration according to its grammatical construction and the ordinary acceptation of the words used, with the assistance of such parol evidence of the surrounding circumstances as is *admissible, * 877 to place the Court in the position of the testator. ✕ Evidence is immaterial in the present case, for there is no need of such evidence here.

It is another and most important rule in the construction of the words used in a will that technical terms, or words of known legal import, must have their proper legal effect attributed to them, although the testator uses inconsistent terms or gives repugnant and impossible directions. To deprive the technical words of their appropriate sense there must be sufficient to satisfy a judicial mind that they were meant by the testator to be used in some other sense, and to show what that sense is.

✕ Another rule of construction has been referred to by several of the Irish as well as by some of the English Judges, viz. that the general intention of the testator was to prevail over the particular intention. This doctrine, which commenced, I believe, with Lord Chief Justice Wilmot, and has prevailed a long time, had, I

thought, notwithstanding the use of those terms by Lord Eldon in the leading case of *Jesson v. Wright*,¹ been put an end to by Lord Redesdale's opinion in the same case, and by the powerful arguments against its adoption in Mr. Hayes's "Principles,"² by Mr. Jarman in his excellent work on "Wills,"³ and by the judgment of the Court delivered by Lord Denman in *Doe v. Gallini*,⁴ in which the opinion of Lord Redesdale is approved and adopted. And, certainly, if accuracy of expression is important, the use of those terms had better be discontinued, though if qualified and understood as explained in the last-mentioned case and in the opinion of some of the Judges—Mr. Baron Watson, for example—it can make no difference in the result. Lord Redesdale

* 878 * says "that the general intent shall overrule the particular is not the most accurate expression of the principle of decision. The rule is, that technical words shall have their legal effect, unless from other words it is very clear that the testator meant otherwise."

The proper application of these rules will enable your Lordships to decide this case correctly. They cannot, as Mr. Hayes observes, be too strongly impressed or too steadily applied. Order and certainty may be in a great measure secured by attending to sound general principles of interpretation, and the number of questions on the construction of wills will diminish in proportion to the degree of stability and consistency evinced in the resolutions of the Courts.

Your Lordships have had the greatest assistance from the judgments in the Court below, and the opinions of the Judges here. Every argument on both sides has been discussed. Every case, I believe, which bears upon the present question has been cited in those judgments and opinions. But the language used in one will is very seldom a safe guide in another; the meaning of each expression is so varied by the context, and, perhaps, the true principles of construction are sometimes not properly carried into effect. The sound, reasonable, and well-established general principles of interpretation as the Lord Chief Justice of the Irish Court of Queen's Bench has observed, ought more to influence the Judges than the consideration of single cases.

The question in this case resolves itself into this, whether the

¹ 2 Bligh, 1.

² Vol. 2, pp. 280, 405.

³ 1st ed. pp. 33, 42, 109, 109, 110.

⁴ 6 B. & Ad. 640.

devisee under a clause in a will made before 1838 (when the law was altered), which in the case of the real estate without words of limitation was sufficient to carry the fee, took an estate for life, or an estate tail in the lands of Clinumphry and Carrigans. The clause is this — [his Lordship read the devise to John].

* Then follow devises in nearly similar terms, of other * 879 lands to his other sons, the differences being totally immaterial to the present question.

William Roddy, under whom the plaintiff below claims, took under these devises an estate tail if John did under the above-mentioned devise. Here we have a technical word, a word of known legal import, added to the devise to John for life, and a devise over in case the devisee dies without issue. If the word "issue" is construed according to its technical or legal import as a devise to all the descendants from the body in succession, the word is a word of limitation, and the rule in *Shelley's Case*, which is inflexible, must be applied, and the devisee would take an estate tail, and the only question is, whether there is any thing on the face of the will which shows sufficiently that the words were used by the testator to designate a particular class or classes of his descendants, so that we ought to read them in that sense.

In the great leading case of *Jesson v. Wright*, Lord Eldon states that the context which is to deprive the technical words (in that case "heirs of his body") of their proper effect must be clearly intelligible and unequivocal. Lord Redesdale in the same case says, "words having a fixed legal effect ought not to be controlled without some clear expression or necessary implication; that inconsistent words only show that the testator was ignorant of the meaning of one or the other." Mr. Hayes in his excellent work¹ before quoted, collects from the authorities the rule to be, "that words should not be diverted from their appropriate sense unless the will itself enjoins their reception in another sense, and not merely in another sense, but in another given sense, as clearly affixed to them."

* This important case of *Jesson v. Wright*, as Mr. Justice * 880 Williams has pointed out in his very clear and satisfactory opinion, is identical with the present, with two exceptions; first, that the expression, "heirs of the body," was used in that case, instead of the expression, "issue," in this; and, secondly, that the

¹ "Inquiry": in the Introduction.

word, "manner," which is used in the power of appointment, given by this will, is not to be found in the will in *Jesson v. Wright*. In both cases, there was a gift to the devisee expressly for life; in both a power of appointment in such shares and proportions as the first devisee should appoint; in both, for want of appointment, the heirs of the body were to take share and share alike as tenants in common, in both, if but one child, that child was to take. The power of appointment and the tenancy in common, though repugnant and inconsistent, were held not to alter the meaning of the devise to heirs of the body, and the words, "one child," were held not to amount to a translation of the testator's meaning in using these words, because, as Lord Eldon observes, though children are included in the words, "heirs of the body," it does not follow, that heirs of the body must only mean children. I entirely agree with Mr. Jarman, that if the Court had uniformly rejected these inconsistent provisions as repugnant, immense litigation and discordance of decisions would have been prevented. The case of *Jesson v. Wright* is precisely in point, unless the two differences above pointed out are material.

There are, however, cases in which it has been held, that there is a difference between the words, "heirs of the body" and "issue," as to the degree of explicitness in the context necessary to restrict the meaning of the latter term.

* 881 The case of *Merest v. James*¹ may be one of such * cases.

It was decided before the case of *Jesson v. Wright*, and when that of *Doe v. Goff*² was thought to be good law, and it is therefore of less weight. But in the case of *Lees v. Mosley*³ a distinction was expressly drawn by Mr. Baron Alderson in delivering the judgment of the Court between the words "heirs of the body," which he considered to be technical words, admitting but of one meaning, and "issue," which is not a technical word, and which is used also in the Statute *De Donis* in two senses; he said that "issue," more readily than "heirs of the body," would yield to the plain intention of the testator, and that it required a less demonstrative context to show such intention. Still it was admitted that, *prima facie*, it might be descriptive of descendants of every degree, and so no doubt it is, and thence it follows that the party contending for a limited construction must show sufficient grounds

¹ 1 Brod. & B. 484.

² 1 Younge & C. Exch. 589.

³ 11 East, 668.

in the context to produce that result. The words "heirs of the body" may be read to mean children only, or descendants living at a particular time, but then the context must be equivalent to the testator saying, "by this term 'heirs of the body' I mean children," or some definite class of descendants. By such context, even those words may be unquestionably deprived of their legal effect.

It is very true that the word "issue," besides having a technical sense, is used more in common parlance. It has, however, a technical sense, and it is laid down, as Mr. Baron Watson observes, by Rainsford, Justice,¹ that "the word 'issue' is *ex vi termini nomen collectivum*, and takes in all issues to the utmost of the family, as far as heirs of the body would do."

I certainly feel a difficulty in figuring to myself what precise sort of context would be sufficient to alter the * sense * 882 of the word "issue," which would not have the same effect if the words used were the admitted technical words, "heirs of the body," and, sitting in the Court of Error, and considering the immense practical importance of laying down fixed rules of construction, I cannot advise your Lordships that you ought to require a less demonstrative context than such context as brings satisfaction to your minds, that the word was used by the testator in a different sense than its proper one, and also clearly shows what that sense was. I must own, that I join in the expression of regret of Chief Justice Monahan, that the Judges have been from time to time endeavouring to make a distinction between "heirs of the body" and "issue," both evidently meaning the same thing, an attempt which has caused great litigation and uncertainty. I cannot help thinking, however, that this difference, when the subject is fully considered, is apparent rather than real, and that, practically, the same degree of certainty in the context to alter the meaning of both expressions is required. In this will I certainly cannot find any thing to satisfy me that the testator meant to confine his devise to children, either generally or born at a particular time. Who shall say, that if his son had children or grandchildren and great grandchildren, he did not mean that they should enjoy his estate in some way, and that the son should not be able to appoint a share to any grandson whom he selected, but was to be confined to children? The devise to "issue," if it be used in its primary and proper sense,

¹ In *Warman v. Seaman*, Rep. temp. Finch, 282.

accomplishes the object of benefiting his descendants as far as the law would permit its accomplishment, and how can I be satisfied that the testator meant a particular class of his descendants alone to take, when he has not pointed out what the particular class is?

I am of opinion, therefore, that the word "issue" is to
 * 883 * be read in its proper sense, and that so reading it, this is to be considered as a devise to John for life and to the heirs of his body, and the rule in *Shelley's Case* must be applied.

The devise over, on an indefinite failure of issue, is an additional argument in favour of this construction. In this respect, the case differs from *Jesson v. Wright*, in which the devise over was on failure of such issue, and these words, if they follow a devise to children would be only considered as referential.

The other distinction between this case and *Jesson v. Wright* is, that here there is a power to appoint to his lawful issue in such manner as he should think fit, which terms are wanting in that case. I agree with the opinion so clearly expressed by Mr. Justice Williams upon this point; and I think, with him, that it is quite unnecessary to question the opinion of Vice-Chancellor Wood in *Kavanagh v. Morland*,¹ and the opinion expressed in Mr. Jarman's work on Wills,² that when words of distribution, together with words which would carry an estate in fee, are attached to the gift to the issue, the ancestor takes for life only, and that whether the fee be given by the technical word "heirs," or by the word "estate," occurring in the description of the subject of the gift, and whether the gift to the issue be direct, or by implication from the power to appoint to them, and whether there is a gift over on a general failure of issue of the ancestor or not. For I agree with Mr. Justice Williams, Mr. Justice Crompton, and Mr. Baron Watson, in thinking that there is no language of the testator in the present case to carry a fee to the issue. I agree, that it is unnecessary to consider whether, in this particular will, the word "manner" would have authorised an appointment in fee. I think that

it would: but the issue would not, in default of appoint-
 * 884 ment, * take more than that which the will expressly says they shall take, for want of such appointment, which certainly would not be an estate in fee in a will of that date, and I concur in thinking that the case of *The King v. The Marquis of*

¹ Kay, 16.

² Vol. 2, p. 371 (2d ed.).

*Stafford*¹ is no authority for the doctrine, that a fee passed merely because there was an unexecuted power of appointment which would have authorised an appointment in fee ; for, in that case, there was an express limitation, in default of appointment, to the children and their heirs.

The supposition that the issue would by law take a fee in this case in default of appointment, has greatly influenced the opinions of the Irish Judges, who gave judgment for the plaintiffs in error, and the opinions of some of the English Judges who have given opinions in their favour, and that supposition, I think, for the reasons before given, is wrong.

I, therefore, concur with the Lord Chief Justice Monahan, and the other Irish Judges who concurred with him, and the majority of the English Judges who delivered their opinions to your Lordships, that by the gift to the devisee for life and after his death to the issue, an estate tail passed in all the lands held in fee simple, and a *quasi* entail in all these freehold lands, and therefore that the defendants below are entitled to the verdict, and the judgment must be affirmed.

This result will be conformable to the great majority of cases, taking England and Ireland together. I consider the present case of great consequence, not from the value of the property at stake, but on account of the paramount importance of adhering to fixed principles of decision, which affords the only chance of attaining a reasonable degree of certainty in the construction of wills.

* The question of costs having been mentioned ; — * 885

LORD WENSLEYDALE. — It is a very proper case in which not to give costs ; with such an equality of opinion in the Court below they ought not to be given.

Judgment affirmed.

Lords' Journals, 17th April, 1858.

¹ 7 East, 521.

VICKERS v. POUND.

1858. May 10, 11.

HENRY VICKERS and JOHN PHILPOT, *Appellants*.
 MARY POUND and others, *Respondents*.

Will Annuity. Particular Fund. General Assets.

A testatrix devised all her real and personal estate to A. and B., to get in and sell the same on trust, to pay debts, and then to discharge "the following legacies," naming two. "I also give and bequeath to T. 2000*l.* (in which sum, or thereabouts, he now stands indebted to me) subject to, and I charge the same with the payment of the following life annuities and sums of money; (that is to say) — "She then gave to her sister 40*l.*, to her sister's husband, W. L., if he survived his wife, 20*l.*, and to her sister, M. P., 20*l.*, which annuities were to be paid when they became due by T.; the first payments to the two sisters at the end of six months after the death of the testatrix; and to W. L. at the end of six months after the death of his wife. The testatrix then gave four legacies of 50*l.* each to nephews and nieces; 40*l.* to the only child of a nephew, and 50*l.* between the two children of a deceased nephew, and directed these legacies to be paid within twelve months after the death of her sister, M. P., and to be paid by T. Then followed a proviso, that she did not intend the legacy of 2000*l.* to T. to exonerate him from the debt due to herself, but whatever should be due at her decease was to be taken in part or in satisfaction (as the case might be) of the legacy; and then came a general direction that "the several and respective legacies hereinbefore bequeathed" should be paid to the respective legatees within twelve calendar months after her decease, or so soon afterwards as her real and personal estates could be collected and converted into money. There was also a direction that the legacies payable to the children of the nephews should be vested interests in them at twenty-one, and in the mean time the money should be invested * by the trustees for the benefit of the children. T. never paid any part of the debt, and became utterly insolvent.

Held (Lord Wensleydale *diss.*) affirming the decree of the Court below, that the annuities and legacies charged on that debt were intended to be payable, if the particular fund (the debt) failed, out of the general assets.

The costs ordered to come out of the estate.

REBECCA YONGE, being a widow, without children, and possessed of considerable property, made her will, dated 30th August, 1850, by which, after directing payment of debts, &c., gave all her real and personal estate to Vickers (the attorney who prepared her will) and Philpot (his London agent) to sell the same, to stand possessed of the proceeds, upon trust, to pay debts, &c.; and, in

the next place, to discharge the following legacies: "to Hannah, the wife of William Lewington, 10*l.*, to my sister, the wife of James Pound, 5*l.*, which I direct shall be paid to them respectively as soon as conveniently may be after my decease. I also give and bequeath to my nephew, George Tennant, the sum of 2000*l.* (in which sum, or thereabouts, he now stands indebted to me), subject, nevertheless, to, and I hereby charge the same with, the payment of the following annuities and sums of money (that is to say), to my said sister, Hannah Lewington, during her life, of an annuity of 40*l.*; to the said William Lewington, during his life, in case he shall happen to survive the said Hannah Lewington, of an annuity of 20*l.*; and to my sister, Mary Pound, of an annuity, during her life, of 20*l.*, which said three several annuities I direct shall be paid, as they become due, by the said George Tennant, by two equal half-yearly payments, the first half-yearly payment of the said annuity of 40*l.* to the said Hannah Lewington, and of 20*l.* to the said Mary Pound, to be made at the expiration of six calendar months next after my decease. * And the first * 887 half-yearly payment of the said annuity of 20*l.* to the said William Lewington, to be made at the expiration of six calendar months next after the decease of the said Hannah Lewington; of the sum of 50*l.* to my nephew, David Pound; of the sum of 50*l.* to my nephew, Charles Pound; of the sum of 50*l.* to my niece, Ann, the wife of James Dolby (late Ann Pound, spinster); of the sum of 50*l.* to my nephew, Joseph Pound; of the sum of 40*l.* to to , the present only child of my nephew, William Pound; and of the sum of 50*l.* unto and between the two children of my late nephew, Daniel Pound. And I hereby direct that the said legacies or sums of money so given to the said David Pound, Charles Pound, Ann Dolley, Joseph Pound, the child of the said William Pound, and the children of the said Daniel Pound shall be paid to them respectively by the said George Tennant, within the space of twelve calendar months next after the decease of my said sister, Mary Pound, free from legacy duty, which I direct shall be paid by the said George Tennant." After the gift of other legacies, came this provision, "Provided always, and I do hereby declare that I do not intend, by the legacy of 2000*l.* hereinbefore bequeathed to my said nephew, George Tennant, to exonerate or release him from the debt which may be due from him to me at the time of my decease. But I direct that whatever sum

or sums of money shall be due from him to me at the time of my decease shall be taken or considered in part or in satisfaction (as the case may be) of the said legacy or sum of 2000*l.*, and shall be reckoned and accounted for by him accordingly." And then she directed that "the several and respective legacies hereinbefore by me respectively bequeathed, shall be paid to the several and respective legatees thereof within the space of twelve calendar

months next after my decease or so soon afterwards

* 888 * as my said real and personal estates can be sold, collected, and converted into money." The "ultimate residue" was given to Henry Vickers, and Vickers and Philpot were appointed executors. The will directed that the legacies payable to the child of William Pound, and the children of Daniel Pound "shall be vested interests in them respectively, at their respective ages of twenty-one years; and, in the mean time, shall be invested by my said trustees or trustee for the time being in or upon any government or real security, and the interest and dividends thereof, either accumulated for the benefit of such children, or be paid and applied in or towards the maintenance and education of such children in such manner as my said trustees or trustee shall think proper.

The testatrix died 2d November, 1852, and the will was duly proved by Vickers and Philpots. On the 7th March, 1854, the respondents filed their bill against the executors, which bill was afterwards amended, and they prayed to be declared entitled to payment out of the general fund to be produced by the sale of the real and personal estates of the testatrix, and not solely out of the debt in the will mentioned to be due to her from George Tennant, he being, in fact, wholly unable to pay the debt or any part thereof. George Tennant became bankrupt on the 7th of July, 1854. The cause was heard before Vice-Chancellor Stuart, who, on the 6th March, 1855, made a decree, declaring the annuities and legacies charged on the debt of 2000*l.* to be general bequests, properly payable out of the general assets, and not subject to any abatement in consequence of the insolvency of George Tennant. Accounts were directed in accordance with this decree, and further directions reserved. The executors appealed against the decree,

and the appeal was heard before the Lords Justices, who,

* 889 on the 12th July, 1855, affirmed the decree. * The accounts were taken, and the cause came on, upon further direc-

tions, on the 17th January, 1856, when an order was made for carrying the original decree into full effect. The present appeal was then brought.

Mr. R. Palmer and *Mr. C. Hall* for the appellants. — The legacies to the appellants are nothing but subsidiary legacies charged upon George Tennant's legacy, and on that alone. Nothing is given to these legatees out of the general assets nor any duty imposed on the executors to pay them. On the contrary, though as to other legatees the executors are directed to pay within so many months after the death of the testatrix, as to these particular legatees, the payment is only to be made so many months after the death of the testatrix's sister. And all these legacies are expressly directed to "be paid by George Tennant"; they cannot, therefore, be called demonstrative legacies, which means legacies charged on a particular fund, but payable out of the general assets, if that fund is found insufficient; *Tempest v. Tempest*.¹ Here the executors would have been discharged if they had paid Tennant his legacy, or if he had owed only 1000*l.*, and they had paid him the other 1000*l.*; in either case the remedy of the legatees must have been against him alone. Or, if the general estate had been insolvent, but George Tennant had been solvent, those legatees could have come on him for payment, and the other legatees would have gone without any thing; *Acton v. Acton*.² In fact, by this form of bequest, he was made a trustee for them, *Cooper v. Thornton*,³ the trust fund being the legacy to which he was entitled under the will. The debt of 2000*l.* existed, but is not to be enforced; by the terms * of the will, the debt due is to * 890 be taken into account as against the legacy; by the non-enforcement of payment that legacy was satisfied. In *Coard v. Holderness*⁴ the testator bequeathed to C. the full amount of whatever sum H. might owe C. at the testator's death, directing that "the amount required for the payment of the same, whatever it may be, be taken out of the amount of that share, to which H. becomes entitled to a life interest under my will." The share of H. proved insufficient to pay the debt, and it was held, that this was not a demonstrative legacy to C., and that the debt due to him could only be satisfied out of that share. That case is directly in

¹ 7 De G., M. & G. 470.

² 3 Brown, C. C. 96.

³ 1 Mer. 178.

⁴ 22 Beav. 391.

point with the present, *Badrick v. Stevens*¹ is to the same effect. Suppose Tennant had been solvent, and had paid the debt due to the testatrix; if the executors had then paid him the legacy which they might do, and he had wasted the money, the respondents could not have come on the general assets of the testatrix, for, as their legacies were specifically charged on this debt, and as this debt had been paid, their doing so would have been to make the estate pay twice over. Tennant's insolvency can make no difference in the rule applicable to this case. The decree appealed against would make the whole estate a guaranty for the solvency of Tennant, which never could have been intended. [THE LORD CHANCELLOR. — If Tennant had paid his debt to the testatrix, and died, would these legacies have failed?] That would be a question on the construction of the will; she does not exonerate Tennant, but merely says, that what is due to her is to be taken in satisfaction of what is given by her, leaving Tennant in possession of the fund on trust, to pay the legacies given to these appellants.

[LORD WENSLEYDALE. — A charge is not a trust; a charge * 891 may be * barred by the Statute of Limitations; a trust is not barred.] When a charge is created on a particular estate, the person on whose estate it is created becomes a trustee for the charge. If Tennant had not owed any thing, and the 2000*l.* had been paid to him, he must have applied it according to the terms of the will. If he had attempted to misapply it, equity would have interfered against him, and, treating him as a trustee, would have prevented the misapplication.

Mr. Malins and *Mr. Welford* for the respondents. — The legacies here were given to near relatives and a large sum to a perfect stranger in blood, the person who prepared the will. The testatrix never could have meant to give him an advantage at the expense of her near relatives. This is a circumstance to guide the House in coming to a knowledge of her intention. The question put by the Lord Chancellor disposes of the case. If George Tennant had paid his debt and died during the lifetime of the testatrix his legacy would have lapsed, but these legacies would not have failed, *Oke v. Heath*.² This is a demonstrative legacy, a general legacy with a particular security, but that security failing with a right to come on the general assets, so far from putting

¹ 3 Brown, C. C. 431.

² 1 Vez. Sen. 135.

these legatees in a disadvantage as compared with the rest, the testatrix gives them the benefit enjoyed by the other legatees and this particular security in addition. *Acton v. Acton*,¹ *Badrick v. Stevens*,² and *Coard v. Holderness*,³ do not apply; they were cases not of ademption but of priority, but *Savile v. Blacket*⁴ is a direct authority. There Lord Mansfield said that a legacy being given to be paid out of a particular * debt if there was no * 892 such debt or the particular fund failed, still the legacy must be paid. That principle was acted on in *Thomond v. Suffolk*,⁵ *Ford v. Fleming*,⁶ *Orm v. Smith*,⁷ *Attorney-General v. Parkin*,⁸ *Ashburner v. Macquire*,⁹ *Cartwright v. Cartwright*,¹⁰ *Roberts v. Pocock*,¹¹ *Mann v. Copland*,¹² in the last of which a legacy was directed to be paid out of the rents of a particular estate, but the will was not attested so as to pass real estate, yet the legacy was held to affect the whole. *Fowler v. Willoughby*,¹³ *Wilcox v. Rhodes*,¹⁴ and *Colville v. Middleton*¹⁵ are to the same effect. If a particular thing is given that or nothing is to be taken, but a gift of a sum of money which is directed to be paid out of another sum of money, as a debt in the hands of a banker or agent, is good, and must be paid though the banker or agent should fail.

Mr. Palmer, in reply. — *Oke v. Heath*¹⁶ does not apply; but *Robinson v. Tickell*,¹⁷ and *Crockett v. Crockett*,¹⁸ show that the payment of the legacy to Tennant would have been good, and his receipt a valid discharge to the executors, and if so then he alone would have been answerable to these legatees as to whom no direct duty was imposed on the executors.

THE LORD CHANCELLOR (LORD CHELMSFORD). — The question upon this will is, whether the annuities to Mr. and Mrs. Lewington and to Mary Pound, and the * legacies to the * 893 testatrix's nephews and nieces of the name of Pound, are

¹ 1 Mer. 178.

² 3 Brown, C. C. 431.

³ 22 Beav. 391.

⁴ 1 P. Wms. 778.

⁵ 1 P. Wms. 461.

⁶ 2 P. Wms. 469.

⁷ 2 Vern. 681.

⁸ Ambl. 566.

⁹ 2 Brown, C. C. 108.

¹⁰ Cited 2 Brown, C. C. 114

¹¹ 4 Ves. 150.

¹² 2 Madd. 223.

¹³ 2 Sim. & S. 354.

¹⁴ 2 Russ. 452.

¹⁵ 3 Beav. 570.

¹⁶ 1 Vez. Sen. 135.

¹⁷ 8 Ves. 142.

¹⁸ 1 Hare, 451

to be paid only out of the debt of George Tennant; so that if he is unable to pay it the parties cannot have recourse to the estate of the testatrix; or whether the estate of the testatrix is not to provide the fund in case of necessity although George Tennant may be the hand to pay the annuities and legacies.

The construction of this ambiguously worded will is necessarily attended with some difficulty, but my mind, after a careful examination of all its provisions, has come to a conclusion in accordance with the judgment of the Vice-Chancellor and the Lords Justices, though, probably, on totally different grounds.

On the part of the appellants it was insisted that the legacy to George Tennant, though, as originally given, it was a general legacy, was made specific by the clause which declared that the testator did not intend by the legacy of 2000*l.* to exonerate or release him from the debt which might be due to her from him at the time of her decease, and that the annuitants and legatees in question were merely sub-legatees of George Tennant dependent upon the fund which he was to provide out of the debt due from him to the testatrix. On the part of the respondents, various authorities were cited to show that it is only where a fund is specifically bequeathed as the fund out of which certain bequests are to be satisfied, and that fund itself ceases to exist, that the bequest fails, but that where a legacy is merely charged upon a particular fund, it is not specific but demonstrative; and if the fund fails the legacy is payable out of the general assets. This latter proposition cannot be converted into a general rule, as the language of each will must receive its own construction, and the intention in each case must be collected from it. It must not be a mere speculative intention, but an intention to be derived from

* 894 * the ordinary interpretation of the words which have been used. Upon the words of the present will, upon which alone I found myself, I think it was the testatrix's intention that a sum of 2000*l.* should, at all events, be provided, out of which the annuities and legacies were to be paid. She does not appear to me to have intended to make these annuities and legacies contingent upon the ability of George Tennant to provide the fund, but to have expressed her will that this fund should be created as the means of satisfying these annuities and legacies.

If before the time of the testatrix's death George Tennant had

paid off his debt, the 2000*l.* must have been raised out of the general estate as the source from which it was to proceed, and so, likewise, for as much as was beyond the amount of his debt at the same period. The original fund, therefore, was the estate of the testatrix, upon the money arising from that primary source the charge is to be made, capable of exoneration by its being relieved out of the debt which might be due from George Tennant. The means which he was to supply may be considered as alternative and substitutionary, in the whole or in part, of the primary fund derived from the testatrix's estate. The 2000*l.* are given to George Tennant as a trustee for the annuitants and legatees, but they were not to be dependent upon his means and ability if he should be unable to supply the fund out of which the trusts were to be satisfied. There does not appear to have been any intention that the general estate of the testatrix was to be relieved from the obligation of providing for the performance of these trusts ; I cannot collect from any part of the will an intention that if George Tennant should pay off his debt and die in the lifetime of the testatrix these annuities and legacies were to fail ; and yet this must be the consequence of making them entirely dependent upon the legacy to him. Nor do * I find any thing which * 895 leads my mind to the conclusion that if the means of George Tennant should fail these annuities and legacies were not to be paid.

I am, therefore, of opinion that the intention of the testatrix was that the annuities and legacies should be paid at all events, that a sum of 2000*l.* was to be provided absolutely for this purpose ; that the supply of the requisite fund through the medium of the debt due from George Tennant was only subsidiary to the main intention ; that the bequests of the annuities and legacies were not specific bequests payable out of a particular fund, which having failed, they necessarily failed with it, but that they were demonstrative bequests and chargeable upon a fund which was to arise out of the general estate of the testatrix, from which it was to be supplied unless provided for by George Tennant in another manner, and this not having been done, the annuitants and legatees are entitled to call upon the executors and trustees of the will to provide from the testatrix's estate the legacy of 2000*l.*, out of which their annuities and legacies are to be paid. This being my opinion, I would recommend your Lordships to affirm the decree

of the Court below, and I move that this appeal be dismissed with costs.

LORD CRANWORTH. — My Lords, I have come to the same conclusion as my noble and learned friend, that the judgment below was substantially correct. There is no question that primarily this is a clear legacy of 2000*l.* The question is, whether the character of that legacy is afterwards altered. Now I must clear the way by saying that in my opinion it is incorrect to say that the payment of the 2000*l.* to George Tennant would have been a wrong payment; I think it would have been a perfectly
 * 896 right payment. And if the 2000*l.* had *been paid to George Tennant, then to George Tennant alone must the annuitants and legatees have looked for payment. He is constituted, in truth, trustee for them. Whether "trustee" is exactly the right word is immaterial. He had a fund intrusted to him, out of which he was to pay certain annuities, and in the progress of time certain legacies. He was, therefore, I think, a legatee of 2000*l.*, left upon certain trusts, and, *inter alia*, upon trusts that were beneficial to himself.

Neither do I pay much regard to the fact, that as to two of the objects of the testatrix's bounty, namely, the child of William Pound and the children of Daniel Pound, there was a direction that the trustees (which must mean the trustees of the will, and not George Tennant) were to invest the two sums of 40*l.* and 50*l.* in question, in case, at the time when, according to the terms of the will, they should be payable, they were infants, and could not, therefore, themselves give a valid discharge. I rather think the explanation which has been given of that is the correct one, namely, that it must have meant, that if that event should happen, the money was to be repaid to the trustees, and secured by them. Or possibly, taking the whole together, it might mean that, although she had given 2000*l.* to George Tennant, for which, as I read this trust, his receipt would have been a good discharge, yet that must be reduced by the 90*l.*, which must be kept in trust for those children. I do not think it is very material to consider which of these interpretations is the proper one. Substantially, I think, it is a gift of 2000*l.* out of her general assets.

Now, at the time of the testatrix's death, George Tennant was indebted to her in a sum which we will call 2000*l.* Now, suppos-

ing there had not been a word in the will about that debt, how would it have been the duty of the executors to administer the assets? Why, there being this gift *of 2000*l.* to *897 George Tennant upon certain trusts for his own benefit as to some part, and certain trusts for the benefit of others as to the rest, it would have been their duty to say: "You, George Tennant, must appropriate this 2000*l.* that you owe in satisfaction of the legacies. That would have been the way in which it must have been appropriated, if nothing had been said upon the subject. Now, is there any thing said which alters that, or which does more than say, that the assets shall be administered, as they would have been administered if no special directions had been given? I think not. That appears clear on referring to all the passages in this will in which mention is made of this debt. — [His Lordship read them.]

Now the contention is, and it must go that length, that the result of the words declaring the legacy to George Tennant is to convert that which is given in the preceding part of the will as a general legacy out of the assets into a specific legacy, payable out of the 2000*l.* which were due from George Tennant at her death, and to make it a specific gift of that legacy, and nothing else. In the first place, such an intention is not readily to be imputed to the testatrix when you consider that the result would be to deprive her own brother and sisters and their children of every thing; or to make the fact of their taking any thing or not, dependent upon that which is never alluded to by the testatrix, the solvency or insolvency of her debtor. That would seem to be a very strange construction, and one that we ought not to adopt, if the words can have any other meaning. Can they then have any other meaning? I think upon all the authorities they can have, and clearly have, another meaning, namely, that the testatrix having given a legacy of 2000*l.*, this was a mere direction on her part pointing to a fund which was the most convenient and natural fund to be appropriated for the payment of it, and * which when so appropriated would, if the debt was 2000*l.*, * 898 be a satisfaction, and should be accounted for by George Tennant accordingly. But she did not mean to say, that if for any reason it could not be made satisfaction, and if he did not account for it, then her legatees and *cestui que trusts* of that sum of money were to be deprived of the benefit. It seems to me that

this is clearly, according to all the authorities and all the principles, merely a direction that that is to be a fund appropriated to the payment, and a statement as to what will be the legal consequences, upon the legacy and the debt, of the fund being so appropriated.

The other construction would clearly lead to results which never could have been anticipated by her, and which are legitimately to be looked to in order to interpret these words. Cases have been put to illustrate the question. My noble and learned friend put a case in the course of the argument: supposing George Tennant had paid off the debt, and had died in the lifetime of the testatrix, what would have happened? And another case was put in the argument: suppose this was a specific legacy, and the debt had been paid during the life of the testatrix? the legacy would have gone. Let me put this other case: it is plain from the subsequent parts of the will, that this testatrix particularly wished to provide for her half brothers and sisters in preference rather to those who were to be provided for out of this legacy. Now, suppose this state of things had happened, that George Tennant had owed the 2000*l.*, and had been perfectly solvent, but that the rest of the estate had been insolvent, could it have been contended, though she says, I give the preference to others, that the 2000*l.* legacy is to take precedence, which must have been the case under the circumstances supposed. I think it could not be so con-

* 899 tended, and therefore it appears * to me that that view of the case also confirms the result at which I have arrived.

The truth is, that in the first instance, the direction in this will merely exemplifies the rule *expressio eorum quæ tacite insunt nihil operatur*. She directs the mode in which the assets are to be administered in the first place. In my opinion the fair result of the whole direction is this: that this is to be the fund which is to be applied in making up the 2000*l.*, and not that this is to be, as the contrary theory would suppose, the only fund for the purpose.

My Lords, these are the grounds upon which I have come to the result. I do not know that it is exactly the view that was taken in the Court below, but it appears to me to be a satisfactory view; and that, consequently, the judgment of the Court below was right.

LORD WENSLEYDALE. — My Lords, in this case I have the mis-

fortune to differ from my two noble and learned friends. If it had been a difference upon any material point of law, which I thought might have been disposed of by discussion between ourselves, I should have asked your Lordships to postpone the decision to another day. But it is merely upon the construction of a written instrument, with respect to which, even when the established rules of construction are honestly applied, two minds may fairly differ. In the construction which I put upon this instrument, I take a different view from that which is taken by my two noble and learned friends.

I think the question depends entirely upon this: whether you can collect from the face of the will, that this is a legacy left by the testatrix to be paid by her executors and trustees to the different annuitants, and the others as a legacy from the testatrix. If so, the pointing out the * 2000*l.* (which * 900 was the debt due from George Tennant) would only be the pointing out the fund that was to be appropriated to the payment of the legacy, but was not to be taken as the absolute satisfaction of the legacy. If that fund was deficient, then, according to the cases which have been cited, it is perfectly clear that you might have recourse to the general assets. If that is the true construction to be put upon this will, the executors and trustees are in that case to pay the legacy, and there is an end to the case.

Now that is the view which was taken, though in a somewhat general manner, by the Vice-Chancellor. The same view was taken also by Lord Justice Turner, in expounding this will. He thought he could collect from it, reading it altogether, that the intention of the testatrix was that these annuities were not to be a charge upon that legacy alone, but were to be paid by the executors and trustee under the will. From the will, taking it altogether, without condescending upon any particular passage, he drew the inference that the legacy was to be paid, and that therefore George Tennant's debt of 2000*l.* was nothing more than the fund appropriated for payment, but not given in satisfaction.

Now, my Lords, I cannot help thinking that that judgment cannot be sustained. Indeed the grounds of that judgment are not supported by either of my two noble and learned friends. I think there is no ground for saying upon the face of this will that this was a legacy that was to be paid by the executors. Lord Justice Turner relied, in the first place, upon the clause at the end of the

will, which is in these terms: "I hereby direct that the several and respective legacies hereinbefore by me respectively bequeathed, shall be paid to the several and respective legatees thereof * 901 within the space of twelve calendar months * next after my decease, or so soon afterwards as my said real and personal estates can be sold, collected, and converted into money." That he considered showed, taking the whole frame of the will together, that it must have been intended that the legacies were to be paid by the executors and trustees. But I think it has been pointed out most successfully by Mr. Palmer, that it is impossible to put that construction upon these words, because it does not apply to legacies which are not to be paid within twelve months after her decease. That is, the legacies to the children and grandchildren of Mrs. Pound are to be paid "within twelve months after the decease of my sister, Mary Pound," but there are several others which are to be paid within twelve months after the decease of the testatrix herself. There is a clear distinction between them.

The second ground upon which Lord Justice Turner also placed great reliance is, that in certain events the executors and trustees are to secure the fund which was payable to the infant children. But if you look at the whole of that sentence, I think it is impossible to put the construction upon it, that the executors are to be the persons who are in the first instance to pay these legacies, because it is directed "that the said legacies or sums of money so given to the said David Pound, Charles Pound, Ann Dolley, Joseph Pound, the child of the said William Pound, and the children of the said Daniel Pound, shall be paid to them respectively by the said George Tennant, within the space of twelve calendar months next after the decease of my said sister Mary Pound, free from legacy duty, which I direct shall be paid by the said George Tennant." Therefore the hand to pay, the person to pay, is George Tennant and not the trustees.

And then the remaining part of the sentence can be easily * 902 explained without the addition of more than a single * word, which may be put in for the purpose of making it good sense, and making it available for the purpose intended. The direction is, "that the said legacies payable to the child of the said William Pound, and the children of the said Daniel Pound, shall be vested interests in them respectively at their respective ages of twenty-one years, and in the mean time shall be invested

by my said trustees or trustee for the time being, in or upon any government or real security; and the interests and dividends thereof, either accumulated for the benefit of such children, or be paid and applied in or towards the maintenance and education of such children, in such manner as my said trustees or trustee shall think proper." Therefore it is perfectly clear that she meant the trustees to receive the money from George Tennant, and when they had received it to invest it.

I therefore think it impossible to conclude from either of those clauses that the executors and trustees were to pay these annuities. By the frame of the will they are to be paid by George Tennant only, and if you look at the whole will it is obvious that there is no other person that is to pay them, and he is to pay them in respect of the legacy of 2000*l.* that he is to receive.

I take it to be clear that a testator may so frame a will that he may make a gift arising out of his bounty an absolute charge upon a particular legacy, without any assistance from the rest of the assets. And I really feel at a loss to find out how words can well be stronger than the words here employed to make this a charge upon George Tennant, in respect of that legacy of 2000*l.*

Then another argument was urged at the bar in order to show that it was the intention of the testatrix that these annuities should be paid out of the general assets. The beginning of this will states that the executors and trustees *are to get in all * 903 debts and to convert into money such parts of her estate as shall not consist of money, and then to satisfy and discharge all the just debts, and funeral and testamentary expenses, together with the expenses which shall be incurred in effecting such sale or sales as aforesaid, or shall otherwise be incurred in the execution of the aforesaid trusts," and then to pay and discharge the following legacies. Now the annuities and legacies which are to be paid and discharged are "to Hannah, the wife of William Lewington, 10*l.*, to my sister Mary, the wife of James Pound, 5*l.*," and then "I give to my nephew, George Tennant, the sum of 2000*l.*" Now that is a legacy which they are to discharge. It is a legacy of 2000*l.* given to George Tennant. Then it is she names the legacies and annuities which she charges on this sum of 2000*l.*, and which she expressly and in words directs to be paid by George Tennant. She imposes upon George Tennant a general obligation to pay those annuities in respect to that legacy of 2000*l.*, and I cannot

understand that there is any thing unusual or improper in that. It certainly may be done by a testatrix, and I am at a loss to see how it could be done in stronger terms than these. That legacy of 2000*l.* is to be charged with those annuities to be paid by him. Then he would become, as has been already pointed out, a trustee for the annuitants if he received the legacy. This legacy to George Tennant is no doubt in the first instance a demonstrative legacy. It is "2000*l.* in which he now stands indebted." That does not make it a specific legacy, but it is a sum of 2000*l.* to be paid out of that fund if it should happen that the fund is sufficient; if not, it is to be paid out of the general assets.

Then comes the next question, what is the state of things, if at the time of the testatrix's death George Tennant is still a
 * 904 debtor in that money? That question is answered * by a subsequent clause, which is in these terms: "Provided always, and I hereby declare that I do not intend by the legacy of 2000*l.* hereinbefore bequeathed to my said nephew, George Tennant, to exonerate or release him from the debt which may be due to me from him at the time of my decease; but I direct, that whatever sum or sums of money shall be due or owing from him to me at the time of my decease, shall be taken and considered in part or in satisfaction (as the case may be) of the said legacy or sum of 2000*l.*, and shall be reckoned and accounted for by him accordingly." That is the mode of satisfying that legacy; and in the event which has happened, namely, that he was indebted at the time of the death of the testatrix, it is the only mode of satisfaction pointed out by the testatrix.

It seems to me, therefore, that the legacy has been satisfied in the manner pointed out by the testatrix. That is the mode in which she directs that it shall be satisfied; and she has never provided any fund for these particular annuitants except upon that sum.

Then, adopting what in my opinion is the true construction of this instrument, confining ourselves to the meaning of the words here used, there is, in my mind, no reasonable doubt what the intention of the testatrix was, that she did not mean to give any legacy at all immediately proceeding from herself of these different annuities, though they were, as Mr. Malins observed, derived from her bounty. She did not mean to charge her general assets with them; she has never said so. The only fund she has charged

with these annuities is the legacy to George Tennant. His receipt alone, I apprehend, would be a good discharge to the executors and trustees for this money, and they would have no occasion to look further than to get his receipt. If he has received the legacy in the way pointed out by the will, * then he becomes * 905 responsible to the annuitants, and there is no other provided for them by the will except that.

It appears to me, therefore, that the construction which has been put upon this instrument by the Vice-Chancellor and also by the Lords Justices is not supported upon a clear view of all the terms contained in the will. It appears to me as clear as possible. With the exception of the clause which directs the trustees to invest the money in the case of infants, and which may be explained as meaning that the trustees were to receive the money from George Tennant, and to invest it, he alone is to deal with this fund. I cannot find in any part of this will a direction that the trustees and executors are, under any circumstances, to pay these annuities out of the general assets.

Therefore I think that upon that ground the decree of the Court below is wrong. Certainly, it appears to me that what has been said by the Lords Justices does not amount to any sufficient proof that the legacies are given out of the estate. A fund is provided, and no mention is made of these annuities except with respect to the debt of 2000*l*. That is the fund provided by the testatrix, and to that fund only the annuitants must look. In the case of the death of George Tennant in the lifetime of the testatrix this legacy would not have lapsed, this being a legacy in trust; the *cestui que trust* would have been entitled to it out of that fund, but still out of that fund only. In the event of his not being indebted at the time of the testatrix's death, he would have been then entitled to receive the 2000*l*., and as soon as he had received the 2000*l*., he would have been liable to pay the different annuities. I think that, pursuing the general rule of interpretation by which we are to look at the words of the will only, and not to speculate upon the intention of the testatrix, there is in this particular will a * fund provided, and only one fund * 906 provided, for the payment of these annuities, and that is the legacy which George Tennant was to receive, and I find nothing whatever to cast upon the general assets the burden of paying these annuities in case that fund is deficient. It has been paid in

the manner that she provides in this will it should be paid. The legacy of 2000*l.* is satisfied, and the recourse of the annuitants must, therefore, be against the estate of George Tennant.

My Lords, my difference of opinion will not make any difference in the result of the judgment in this case ; but I should hope that the judgment of the Court below will not be affirmed with costs, inasmuch as the judgment of the Lords Justices is not supported upon the ground upon which they rest it, and there is a difference of opinion among your Lordships.

LORD CRANWORTH. — If the judgment below is affirmed, there seems no escape from the rule that it must be affirmed with costs.

Mr. Malins. — After the two judgments in the Courts below, no costs ought to be allowed in diminution of these legacies.

Mr. Palmer submitted that under the circumstances here both parties ought to have costs out of the estate.

LORD CRANWORTH. — I omitted to advert to one provision in the will, that after the payment of the legacies to the half brothers of the testatrix in priority over all the other legacies, she says, “ And if, after payment of such legacies to my said half brothers and sisters, and their children, and the said Henry Vickers, there shall be any deficiency in my estate to pay and discharge the * 907 whole of the other * legacies in full, then those other legacies shall be abated *pro rata*.” It strikes me that that is very inconsistent with the notion of a specific legacy. If it was a specific legacy, it would not abate at all. I submit that the costs ought to come out of the estate. It will be the same thing if the estate is sufficient.

LORD WENSLEYDALE. — I think that is clearly the right course, the difficulty having been created by the testatrix herself.

THE LORD CHANCELLOR. — The costs of the respondents are to come out of the estate.

Decree affirmed, and appeal dismissed with costs. The costs of respondents to be paid out of the estate.

Lords' Journals, 11th May, 1858.

BURROWES v. GORE.

1857. May 19, 20, 22, 25. 1858. April 19; June 1, 3, 11.

ROBERT BURROWES and others, *Appellants*.THOMAS GORE and others, *Respondents*.¹*Bond. Settlement. Trust. Circuity of Suit. Statute of Limitations.*

By the marriage settlement of R. B. in 1767 there was (in addition to other things) a sum of 1500*l.*, secured for the portions of younger children of the marriage, to be apportioned as he might think fit. In 1806 his daughter (a young child) married G. G., and on occasion of that marriage R. B. executed two bonds to secure payment of two sums, 1000*l.* and 500*l.*, payable on his death, the former not to bear interest till his death; the latter to bear interest from the execution of the bond. These bonds were accompanied by warrants of attorney, on which, however, judgments were never entered up. On the same day a marriage settlement was executed, which vested these two bonds in T. B. (R. B.'s son and heir at law), and J. H. C. as trustees (they being so described in the bonds themselves) on trust, to pay the interest to G. G. and his wife during their lives, and after their deaths in *trust *908 for the children of the marriage, in such shares as G. G. should appoint; otherwise equally. No appointment was made. In 1807, T. B. married, and on his marriage a settlement was executed, by virtue of which the estates of R. B. were conveyed to trustees for the term of three hundred years on certain trusts, one of which was to raise a sum of 5000*l.*, and apply the same in the first instance to pay the 1500*l.* the portions for R. B.'s younger children, and the rest to the payment of such specialty debts as "are now due and owing" by R. B.; and if there should be any residue, to pay over the same to R. B. Subject to this term, the estates were conveyed to R. B. for life, to T. B. for life, and to the first and other sons of T. B. in tail male. R. B. died in 1816, and T. B. entered into possession of the estates. R. B.'s widow took out probate of his will, and received general assets to the amount of 7500*l.* T. B. died in 1836. Interest on the sum secured to G. G. was paid, during his life, by the agent of T. B., and of his son R. B. the younger, who had succeeded under the settlement of 1807 to the estates. A part of the sum of 5000*l.* was raised in 1844, and the 1500*l.* secured by the settlement of 1767, as portions for younger children paid off, but the 1500*l.* secured by the bonds were not raised. In 1846 G. G. died. There was no evidence of payment of interest after his death. In 1848 the children of G. G. filed their bill against R. B. the younger, R. G. (one of their brothers, who for the purposes of the suit had taken out administration *de bonis non* to R. B. the elder), and against the possessor of the term, praying that the money secured by the bonds might be sat-

¹ *Kensington v. Bouverie*, 7 H. L. Cas. 569; *Archbold v. Sully*, 9 H. L. Cas. 369.

ified out of the term, &c. An inquiry and accounts were directed, and a report made and confirmed on further directions. An appeal was then brought against the original decree and this decree on further directions:—

Held, that under the special circumstances existing here the suit was maintainable; that though the personal representative of R. B. the elder was primarily answerable, yet, as the trustees of the bond debt could only sue the person in whom the term was now vested, as that person must then sue R. B. the younger as holder of the estate which was subject to the term, and as R. B. the younger, besides being the holder of that estate, was also the representative of T. B. the trustee of the bond debt under the settlement of 1806, a Court of equity, seeing that all the parties really interested were before it, would not, especially after an inquiry and report, dismiss the bill for matter of form, and thus create a necessity for such a multiplicity of needless suits.

Held also, that the settlement of 1806 created a trust in respect of the bond debt; that that debt was not within the words of the settlement

* 909 * of 1807 a debt of R. B., then “due and owing,” but that it would have been so had the trustees performed their duty by entering up judgment on the warrants of attorney, and that their neglect in this respect could not be set up as a defence by R. B. the younger, as the owner of the estate, he himself being also the representative of the surviving trustee, and, as such, bound to obtain payment of the money secured by the bond.

Per LORD ST. LEONARDS. — These bonds were equitable charges on the land.

Held (Lord Wensleydale *diss.*), that the Statute of Limitations, 3 & 4 Wm. 4, c. 27, did not operate as a bar to this suit, an express trust of a charge upon land being by the true construction of that statute as much saved from its operation as an express trust of the land itself; and as Robert Burrowes the younger represented his father (the surviving trustee of the bonds), and was himself the owner of the estate out of the term in which these bonds were by the trusts of the deed of 1807 to be satisfied, he was at once the hand to pay, and the hand to receive, and he therefore could not set up the statute as his defence for not performing the trust.

Held also, that the right of these *cestuis que trust* did not arise till the death of G. G. in 1846, and that as they had brought their suit within two years afterwards, the 3 & 4 Wm. 4, c. 27, did not in fact apply to them.

On the marriage in 1767 of Robert Burrowes the elder an estate was settled on him for life, remainder in tail to the eldest son of the marriage, subject to a charge of 1500*l.* for the younger children of the marriage. Robert Burrowes the elder was also entitled in absolute ownership to certain other lands which were not put into settlement. Thomas Burrowes was the eldest son of this marriage. There were four other children of the marriage, all daughters, of whom it is only necessary to refer to Anne Burrowes.

In 1806 Anne Burrowes was married to the Honourable and Reverend George Gore, and on the 31st March in that year Robert Burrowes the elder executed two bonds (in which Thomas Bur-

rowes his son and J. H. Cottingham, Esq., were the obligees, and were described "as trustees in the marriage settlement" of the same date), the first bond for the sum of 1000*l.*, payable upon the day of the death of the * obligor, which sum was * 910 not to bear interest until that day, and the second bond for the sum of 500*l.*, payable on the same day, but which was to bear interest from the date of the bond. A warrant of attorney was executed at the same time in respect of each bond, but no judgment was ever entered up on either of them. On the same date as the bonds, R. Burrowes executed (but whether before or after the moment of their execution was not proved) a marriage settlement, by which the two obligees of the bonds, Thomas Burrowes and J. H. Cottingham, were appointed trustees under the settlement; and these two sums were declared to be vested in them as trustees to pay the interest to Mr. and Mrs. Gore for their respective lives, and after the death of the survivor of them to divide the principal among the children of the marriage in such shares as Mr. Gore should by deed or will appoint, and, in default of such appointment, equally. There were seven children of this marriage, Thomas, Robert, George, Anne, Frances, who became the wife of Mr. Sankey, Sophia, who married Mr. Turbett, and Louisa, married to Mr. Waldron.

In October, 1807, Thomas Burrowes (the obligee in the bonds and the trustee in Mr. Gore's settlement), the only son of Robert Burrowes the elder, married Miss Seward, and on his marriage the estate tail to which he was entitled under his father's settlement, and the estates which his father held in absolute property, were made the subject of settlement. All those estates were conveyed to the Reverend Joseph Storey and John French, their executors, &c. for the term of three hundred years, and subject thereto to the use of Robert Burrowes the elder for life, remainder to Thomas Burrowes for life, with remainder to the first and other sons of Thomas Burrowes in tail male, according to the usual course of family settlements. The trusts of the term were that "the trustees shall, as soon as convenient, by mortgage, * sale, * 911 demise, &c. of all or any part of the premises comprised in the term, &c. raise 5000*l.* sterling Irish currency and the interest thereof, and apply the same for the purposes following: in the first place, to pay 1500*l.* to satisfy the sum secured on the marriage of Robert Burrowes the elder in 1767, as portions for younger chil-

dren, so that the premises comprised in the term should be exonerated from the same; next, to "apply the remainder of the sum of 5000*l.* towards payment of such judgment and specialty debts as are now due and owing by the said Robert Burrowes [the elder] in such order, course, and precedence as he, Robert Burrowes, his executors or administrators, may think proper; and in case there shall be any redundancy of the said sum of 5000*l.*" to pay the same to him. Provided that in case the person to whom the next estate of freehold in the premises comprised in the term of three hundred years should belong, should pay to Storey and French, their executors, &c. the 5000*l.* and interest and costs, then the term was to be void. This term came by subsequent events to be vested in Mrs. Olivia Caulfield.

Recoveries of the lands comprised in this settlement were soon afterwards suffered to the uses of the settlement. There were three children born of this marriage, Robert Burrowes the younger (the present appellant), and two others.

Robert Burrowes the elder died in 1816, and his son Thomas entered into possession of the premises comprised in the deed of October, 1807, and so continued until his death in April, 1836.

In 1827 the wife of Robert Burrowes the elder (and who was his executrix and residuary legatee) died. She received 7500*l.* out of the general assets, but did not appear to have taken any steps with regard to the payment of the bonds.

In 1831 Robert Burrowes, the appellant, attained twenty-one, and soon afterwards joined his father in resettling the
 * 912 estates, * and charging them with a sum of 6000*l.* for the father's benefit. This sum was raised by two mortgages, of the 1st February, 1834, and 3d March, 1835, and, subject to them and to the charge of 1500*l.*, provided by the settlement of 1767, the estates were resettled to the use of Thomas Burrowes for life, remainder to the appellant, Robert Burrowes, for life, remainder to his first and other sons in tail male, with a power to him for jointuring and charging portions for younger children.

In 1836 Thomas Burrowes (who had survived J. H. Cottingham, his co-trustee in the settlement of 1806) died, having made a will, in which he had appointed his son Robert his executor, and which was proved by the said Robert Burrowes. It was alleged that Thomas Burrowes had during his life paid interest on the two bonds to the Rev. Mr. Gore.

In 1838 Robert Burrowes (the appellant) married Anne Carden, and on occasion of this marriage a deed was executed (October, 1838), charging the estates with a jointure of 1000*l.* a year in her favour, and 10,000*l.* as portions for younger children of the marriage.

In 1834 Frances, one of the daughters of the Honourable and Reverend George Gore, married Mr. Sankey, and on her marriage her father appointed to her a sum of 500*l.*, a portion of the two sums, 1000*l.* and 500*l.* secured by the bonds of Robert Burrowes the elder. In 1838 Louisa, another of the daughters of Mr. Gore, married Mr. Waldron, and on her marriage her father appointed a sum of 909*l.*, another portion of the same sums. Mr. Gore survived his wife Anne, and died in August, 1846, and on his death his children became entitled to their shares in the 1000*l.* and 500*l.* secured by the bonds, &c.

On the 9th of September, 1848, the children of the Reverend Mr. Gore (except Robert Gore, who, for the purposes of the suit, had taken out administration *de bonis non* to * Robert * 913 Burrowes the elder, and was made a defendant in the suit), filed a bill (afterwards amended) against Robert Burrowes, the grandson, his wife and children, Robert Gore as administrator, and Mrs. Caulfield as the person in whom the term for three hundred years had come to be vested, in which, after setting forth the above facts, they alleged that there were no assets of R. Burrowes the elder, except the 5000*l.* charged on the term of three hundred years, and that R. Burrowes (the appellant), the son and executor of Thomas Burrowes, whose estate was subject to the said term, and who was the person legally entitled to receive the said sums of 1000*l.* and 500*l.* in trust for the plaintiffs, refused to sue Robert Gore the administrator, &c. on the bonds, and that there were no other debts of R. Burrowes the elder, except those due on the bonds; and the bill prayed that accounts might be taken of what was due to the plaintiffs for principal, interest, and costs on the sums secured by the bonds; that the same might be decreed to be well charged on the lands secured by the term; that Robert Burrowes might be decreed to pay the same; that an account might be taken of the personal estate of the grandfather, including the sum of 1500*l.* by the term, and that the same might be duly administered, or, if necessary, the lands, &c. comprised in the term, sold; and for a receiver and for general relief.

Robert Burrowes (the appellant) filed his answer (which was afterwards amended) in January, 1849, insisting that the 1500*l.*, the portion of the younger children of the grandfather, had been long since paid off, and that all the other trusts of the term of three hundred years must be presumed to have been satisfied, and that the term itself had therefore ceased under the proviso for that purpose in the deed of 1807; that Robert Burrowes the elder had left assets, amounting to upwards of 7500*l.*, which were possessed by his widow, and were, independently of the 5000*l.*

* 914 charged * on the term, amply sufficient to pay all his debts, &c., and that they were the proper funds to pay the bonds; that these bonds had never been recognised for thirty years as charges against the estates, nor had the bonds ever been produced to him until shortly before the bill was filed; and he submitted that the bill was not rightly framed, the plaintiffs not being in any privity with the estates sought to be charged; and he denied that he had refused to sue Robert Gore as administrator, &c. of Robert Burrowes the elder, never having been called on to do so; wherefore this bill could not be maintained against him; and he admitted that, as his father's personal representative, he had paid interest on a sum of 500*l.*, the same having been returned by his solicitor as one of his father's debts, and had tendered the said sum of 500*l.* to Sankey, one of the complainants. He alleged that he did not know how this claim originated; that he believed that the 500*l.* on which he paid interest had been received by his father as trustee, and having been so received by his father held himself accountable for it, and he, defendant, was ready to account for the same; and he claimed the benefit of the Statute of Limitations.

Evidence having been taken in the cause, it came on for hearing upon the 6th of July, 1853, before Lord Chancellor Brady, when his Lordship was pleased to declare, that the 1000*l.* and the 500*l.* were not "specialty debts then due and owing" by Robert Burrowes the elder within the terms of the settlement of 1807, and so chargeable upon the term thereby created, but were to come out of the personal assets of Robert Burrowes the elder; and it was ordered that the Master should inquire whether any and what parts of the sum of 5000*l.* secured by the trust term of three hundred years remained unraised at the death of Robert Burrowes the elder, the obligor; and if the sum of 1500*l.*, the portion of his younger children, was raised out of that term; and it

* was declared that the residue of the 5000*l.* unraised out * 915 of the term was part of the personal estate of Robert Burrowes the elder, and applicable, in the first instance, to discharge his judgment and specialty debts due at the execution of the settlement in October, 1807; and if the 1500*l.*, the portion of the younger children had not been raised, that, after payment of that sum, the residue of the 5000*l.* was part of his personal estate, applicable to discharge such judgment and specialty debts in the said bonds as were due and owing at the time of the execution of the settlement of 1807. And the Master was directed to inquire how the sums raised out of the term were applied, and to take an account of all charges affecting the term, and report their priorities, and to take an account of the personal estate of Robert Burrowes the elder, and into whose hands it came, and how it was applied, and further directions were reserved; and it was declared that this decree was without prejudice to any question under the Statute of Limitations.

On the 6th July, 1854, the Master made his report, finding (among other things) that no part of the sum of 5000*l.*, secured by the trust term of three hundred years, created by the settlement of October, 1807, had been raised on the security of that term at the death of Robert Burrowes, the obligor; that in January, 1844, the sum of 1500*l.*, the portion of the younger children of the said Robert Burrowes, and which was the first charge affecting the sum of 5000*l.* secured by the term, was paid off by the defendant Robert Burrowes (the appellant), who, on the death of his father, Thomas Burrowes, became entitled to the premises comprised in the term; that 3500*l.*, the residue of the 5000*l.* secured, were still unraised out of the term; that the said residue formed part of the personal estate of Robert Burrowes the elder, and that the term, and the trusts thereof, were still subsisting and unfulfilled as regarded the said sum of * 3500*l.*; that there were no other charges af- * 916 fecting the term; that after the decease of Robert Burrowes the elder, his widow, Sophia, swore his personal estate to be under 7500*l.*; that no evidence of the particulars of such personal estate had been furnished; that the whole of it (except the 5000*l.* secured by the term) came to her hands, and was applied by her in payment of debts and legacies, &c.; that none of the personal estate of Robert Burrowes the elder had come into the hands of Robert Gore, who since her death had taken out administration *de*

bonis non of Robert Burrowes the elder, and that there were no debts unpaid, save the principal and interest on the two bonds. A schedule annexed to this report set forth the money due for such principal and interest. By an order made on the 17th November, 1854, this report was confirmed, and the respondents were declared entitled to be paid the principal and interest on the two bonds, as from the 27th August, 1846, the date of the death of the Honourable and Reverend George Gore. The present appeal was then brought against both the original decree and the order on further directions.

The Attorney-General (Sir R. Bethell) and Mr. Roundell Palmer for the appellants. — This suit cannot be sustained in its present form. The representatives of the bond creditors of Robert Burrowes the elder, cannot sustain a bill to charge the holder of the estate on which the three hundred years' term has been created under the trusts of the deed of October, 1807, except on alleging and proving collusion between the personal representative of the said Robert Burrowes and the appellant, or insolvency, or some very special circumstances, *Utterson v. Mair*,¹ *Troughton v. Binkes*,² * 917 *Alsager v. Rowley*,³ * *Benfield v. Solomons*,⁴ *Burroughs v. Elton*,⁵ *Wright v. Hamilton*,⁶ *Barker v. Birch*.⁷ There are no such circumstances here ; and the bill does not allege that Robert Gore, the personal representative of the grandfather, refused to sue Robert Burrowes the appellant and the holder of the estate, but that the appellant refused to sue Robert Gore. It was not the duty of the holder of the estate to sue the personal representative of the debtor on the bonds, and the proper parties to the suit on the bonds have not been brought before the Court. The holder of the estate ought not to have been included in this suit. The respondents are not in privity with the estates sought to be charged, nor with the trusts of the term ; yet the appellant has been, in the character of owner of the estate, sought to be charged by those who had no direct interests in the trusts of the term, but who are only personal creditors of a former owner of the estate, and, as such, have no power to enforce their claims against it. *Walwyn v.*

¹ 4 Brown, C. C. 270.

² 6 Ves. 573.

³ 6 Ves. 748.

⁴ 9 Ves. 77.

⁵ 11 Ves. 29.

⁶ 3 Jones & L. 465.

⁷ 1 De G. & S. 376.

Coutts,¹ *Garrard v. Lord Lauderdale*,² *Williams v. Everett*,³ and *Gibbs v. Glamis*,⁴ show that by the principles of equity and common law such a suit as the present is not maintainable.

The sums of money directed to be raised under the trusts of the term of three hundred years must be presumed to be satisfied, and the term itself surrendered. These bond debts were not specialty debts then "due and owing," and were consequently not included in the trusts created for the payment of such debts. Robert Burrowes, the grandfather, and the obligor of the bonds, died in 1816; his widow was his *executrix; she was legally *918 liable to pay these two bond debts if they were in fact still subsisting, and large sums came to her hands wherewith she could have paid them. She remained alive till 1827; yet there is not the smallest evidence that she paid interest on them, or that any demand in respect of them was made on her, or has been made since then until this bill was filed. It must therefore be presumed that they had been paid before that time. The only reference to any payment of interest which is introduced in order to lead to a contrary presumption, is introduced into the bill by way of amendment, which is, however, in the vaguest terms, "that by some arrangement between Mr. Gore and Thomas Burrowes the interest on the said sums of 1000*l.* and 500*l.* was satisfied or paid during the life of the said Thomas Burrowes." Of that allegation, vague as it is, there is no proof. On the other hand, there are the subsequent dealings with the estate, and especially the settlement on the marriage of Robert Burrowes the appellant, all which go to show that the trusts of the term must have been previously carried into effect, and so the term itself satisfied. There are clauses in the deed of October, 1807, which provide for such a course. No account is given to explain the delay, or to show that any claim on these bonds was kept alive in the intervening period; and in answer to the allegation in the bill as to the payment of interest during the life of Thomas Burrowes, the appellant shows that there is no proof of such payment in that character; and as to the pretence that he himself subsequently paid interest, he acknowledges to a payment of interest on a sum of 500*l.*, but alleges that he believed that to be a sum of money which his father had received as trustee, and as he had not paid it over, was liable to pay interest upon it,

¹ 3 Sim. 14, 3 Mer. 707.

² 3 Sim. 1, 2 Russ. & M. 451.

³ 14 East, 582.

⁴ 11 Sim. 584.

but that till after this bill was filed he never knew how it
 * 919 arose, or was claimed. He had repeatedly * before the
 suit offered to pay it, and consequently the suit against him
 was wholly unnecessary.

The decree is expressly made "without prejudice to any question under the Statute of Limitations." The appellants here rely on that statute. The same circumstances which raise presumption of payment, also give rise to this defence of the statute. In *Grenfell v. Girdlestone*,¹ a bill was filed by a judgment creditor one day before the Statute 3 & 4 Wm. 4, c. 27, came into operation. The judgment had been entered up twenty-eight years before, and since then no step had been taken to enforce it. The debtor had been insolvent during a considerable part of that period. It was held that the plaintiff was barred of all equitable relief by lapse of time alone, independently of any question whether satisfaction of the judgment could or could not be presumed. In *Baldwin v. Peach*,² it was declared that a Court of equity will presume a release within the same limits of time within which a jury would be directed to presume it, whether any statute of limitation is applicable to the case or not; *Leman v. Newnham*,³ is to the same effect. And in *Harrison v. Duignan*⁴ even the appointment of a receiver was held not to prevent the operation of the Statute of Limitations, notwithstanding the fact that the Master had expressly found that the estate was subject to the encumbrance, and that decision was acted on in *Hughes v. Kelly*.⁵

Mr. Rolt and *Mr. Fleming* for the respondents. — The facts of this case are important. Thomas Burrowes was the legal creditor of the estate, being one of the obligees in the bonds, and
 * 920 trustee for the respondents; he was * the sole master of the legal proceedings, and at the same time he was the owner of the land out of which payment of the bonds was to come. His son, the appellant, holds the same characters. He ought, as trustee, to sue the possessor of the estate, that is, to sue himself. His duty, therefore, is clear; but his interest is opposed to it. The double character in which he stands prevents the operation of the Statute of Limitations in his favour. Though the payment of the principal in these two bonds was not to be enforced till the death

¹ 2 Younge & C. Exch. 662.

⁴ 2 Drury & War. 295.

² 1 Younge & C. Exch. 453.

³ 3 Drury & War. 482.

⁵ 1 Vez. Sen. 51.

of the grandfather, still the debt on each was constituted by the bonds and settlement of 1806. It was *debitum in presenti*, though "*solvendum in futuro*." It was at the date of the settlement a "debt due and owing," and the obligees and the persons for whom they were interested became specialty creditors from that time. In fact, this debt was recognised by a payment of interest up to the death of Mr. Gore. A trust was created, and Thomas was the trustee, expressly so described, and not the mere agent to pay the debts of his father. The principles declared in *Synnot v. Simpson*¹ are directly in point here. What was done in 1806 and 1807 was contract, not mere voluntary act; and, in that respect, *Walwyn v. Coutts*,² and *Garrard v. Lord Lauderdale*³ are not in point. Nor is *Williams v. Everett*,⁴ because that turned on commercial habits of dealing, and there was not in it any question of trust on which equitable jurisdiction is founded. Here the term of years was created on the express trust to pay specialty creditors; and the creditor, whose children are endeavouring to enforce the trust, did not require to have the deed communicated to him, for he

* was a party to it. *Tomlinson v. Gill*,⁵ is in point here; * 921 and so is *Gregory v. Williams*.⁶ The case of *Davenport v.*

*Bishopp*⁷ is still stronger. There it was held that if two parties, for a valuable consideration, enter into a contract, of which one of the stipulations is solely for the benefit of a third person, who is a stranger to the contract, and from whom no consideration moves, it is not competent for either of the contracting parties afterwards to object to that stipulation. The consideration for the contract here was marriage, which the law treats as one of the most valuable kind. *Gibbs v. Glamis*,⁸ carried the law to the very utmost verge, and the doctrine there stated was doubted by Lord St. Leonards, in *Simmonds v. Palles*,⁹ where the creditor was not permitted to file a bill, not because he was not a party to the contract, but because the arrangement for the payment of his bill of costs was merely a part of the general arrangement for the benefit of a person who was a party to it, and not of him. But where, as in *Dale v. Hamilton*,¹⁰ the person suing, though not absolutely a party to the deed, has a benefit reserved for him, and the others stand

¹ 5 H. L. Cas. 121.

² 3 Sim. 14, 3 Mer. 707.

³ 3 Sim. 1, 2 Russ. & M. 451.

⁴ 14 East, 582.

⁵ Amb. 330.

⁶ 3 Mer. 582.

⁷ 2 Younge & C. Ch. 451.

⁸ 11 Sim. 584.

⁹ 2 Jones & L. 489.

¹⁰ 2 Phill. 266.

to him in the character of trustees, though he may have no legal rights as against them, that trust will be enforced. *Acton v. Woodgate*,¹ and *Bill v. Cureton*,² show that a voluntary engagement of this sort will constitute a trust, and the children of the intended marriage are the persons for whose benefit that trust is created. It is true that the Lord Chancellor of Ireland thought that these bonds were not specialty debts, then "due and owing," and that

the trusts of the term could not, for that reason, have contemplated * 922 payment of them; but he gave relief upon other grounds. But here the settlement does, for the

reasons already stated, constitute a trust; and that being so, the Statute of Limitations can have no operation in favour of the trustee. The case is exactly within the rule in *Burrell v. Lord Egremont*,³ where, there being a subsisting charge, and no person who, by the delay, could be induced to suppose the charge was abandoned, the statute did not apply. The respondents here are not merely *cestuis que trust* of the term, but also specialty creditors of Robert Burrowes the elder, and are entitled to come on his general estate; and by the trusts of the term may come on that for satisfaction of their claim. And though his widow might have committed a *devastavit*, the trusts of the term are still on foot, and the trustees under the settlement are bound to see that the trusts thereby imposed on them are performed; and they are specialty creditors, provided for by that trust. Under such circumstances, the Statute of Limitations does not apply. Equity will interfere, in order to prevent circuity of action. *Travis v. Milne*,⁴ and this suit is properly constituted to prevent circuity of action, for the creditor sues the man whom the executor, if he did his duty, ought to sue, and would be enabled to sue. If there was a technical impediment in the way of the executor suing, equity would remove it, in order to give effect to the general principle.

1858. April 19.

LORD CRANWORTH, having fully stated the case, said: There is no doubt that the plaintiffs in the suit below were, together with the defendants, Robert Gore and George Gore, as *cestuis que trust* of the bonds, entitled to the money thereby secured. The question is, whether the present appellants, Robert Burrowes,

¹ 2 Mylne & K. 492.

³ 7 Beav. 205.

² 2 Mylne & K. 503.

⁴ 9 Hare, 145.

and those interested * under his marriage settlement, in the * 923 lands comprised in the term of three hundred years, are liable to the payment.

On the part of the respondents, the plaintiffs below, it was argued, in support of the decree, that they were entitled to be considered as creditors on the estate, inasmuch as their trustees, the obligees in the bonds, were creditors expressly provided for by the settlement of the 3d October, 1807, which created the term of three hundred years. The trustees of the term are directed by means thereof to raise a sum of 5000*l.*, and thereout, in the first place, to pay off a sum of 1500*l.*, provided by the marriage settlement of Robert Burrowes the elder, the father of Thomas, and grandfather of the appellant Robert, as portions for his younger children.

The trust is then declared as follows — [his Lordship read it].

The term, therefore, was to raise 5000*l.*, of which 1500*l.* were to be applied in exoneration of the charges which had been created upon the marriage of Robert Burrowes, the grandfather, so long ago as 1767. And the residue was to be applied in payment of the specialty debts of Robert Burrowes, in such order as he or his executors should direct; and if no such direction should be made, then to be paid to Robert Burrowes, as part of the personal estate. It was argued by the respondents, that the bonds now in question were specialty debts, then due and owing by the said Robert Burrowes, the elder; for that, although the two principal sums secured were not made payable till after his death, yet the debt must be considered as a present debt, *debitum in presenti solvendum in futuro*. To this reasoning, I cannot assent. The trustees of the term were bound to discharge the debts, provided for in such order as Robert Burrowes should direct; and therefore, till it is shown that he had directed these bonds to be discharged

* in preference to other debts, by judgment or specialty, the * 924 trustees could not have legally discharged them. But further, these were not debts by specialty coming within the meaning of the words “debts now due and owing by the said Robert Burrowes.” The debts there contemplated were clearly debts in respect of which there was a present demand against Robert Burrowes, and present payment of which might have been enforced. This was the opinion of the Lord Chancellor of Ireland, in which I concur.

It is, therefore, unnecessary to discuss the question as to how far, if these obligees had been creditors contemplated by the deed, the trust in their favour could or could not have been enforced at their instance. That question does not arise, when it is once decided that the obligees are not creditors within the meaning of the trust.

The decree, however, did not proceed on the ground that the trust was intended to make any direct provision for the obligees of the bonds. The right established by the decree was not a right founded on the principle that the obligees were direct *cestuis que trust* of the term, but on the ground that the right of the plaintiffs was a right against the personal representatives of Robert Burrowes the elder, to be paid out of his assets, and that the whole of the 5000*l.*, or so much of it as had not been raised and applied in discharge of the prior charges and debts, constituted part of his personal estate, and so was applicable to the payment of the bonds. And the persons entitled to the estate, subject to the three hundred years' term, were made defendants, as being in respect of the trusts of that term, debtors to the personal estate of Robert the obligor.

The general rule of the Court of Chancery in suits for administering the estates of testators or intestates is, that a debtor to
 *925 the estate which is under administration, cannot * be made a co-defendant with those who represent the estate. In such suits the Court is in truth only giving to creditors their legal rights; acting in a mode calculated to secure, as far as possible, equal rights to them all, but still dealing only with the same persons who would have been litigants at law. This rule, however, has been departed from when there has been collusion between the personal representative bound to get in the estate and administer it, and a debtor to that estate. So also where the deceased debtor was in partnership with others, and it had been impossible to ascertain and get in his estate without taking the partnership accounts. And there may be other exceptional cases. The Lord Chancellor of Ireland thought that this was an exceptional case, because the lands comprised in the three hundred years' term have, ever since the death of Robert Burrowes the elder, in 1816, when the bonds became payable, been held and enjoyed, first by Thomas his son, and afterwards by the appellant, Robert, his grandson, during which period Thomas and Robert were successively the persons who represented the obligees in the bonds. So

that the persons bound to protect the interest of the *cestuis que trust* had all along been the persons entitled to the money secured by these bonds, and also the persons out of whose estate these bonds ought to have been paid.

But was this a correct view of the case? Thomas Burrowes during his life and after his death, Robert, his son, have been successively owners of the land in question, that is, Thomas for his life, and since his death, Robert, as tenant in tail. The land had, long prior to the commencement of the life estate of Thomas, been charged with the payment of 5000*l.* secured by a term of three hundred years. After the death of Robert Burrowes the elder, the persons beneficially interested in this sum of 5000*l.* were, as to 1500*l.* part thereof, the younger children of Robert Burrowes * the * 926 elder, and as to the residue, his personal representative. The circumstance that the persons who were successively in possession of the estate were in their character of trustees of the bonds, creditors on the estate of Robert, interposed no obstacle or difficulty in the way of his representative. His widow, who alone proved his will, might at any time have filed her bill to enforce payment of whatever was secured to Robert, her late husband, by this term. And after her death in 1827, the same course might have been taken by any person then obtaining administration *de bonis non* to Robert Burrowes the elder. No difficulty therefore existed on the ground that the persons to pay, and the persons to receive, were the same. The persons to receive what was due on the three hundred years' term, were not the obligees in the bonds, but the personal representative of the obligor.

The suit, therefore, appears to me to have been framed on a principle not warranted by the ordinary practice of the Court. The question however is, whether, even if the suit was inaccurately framed, any substantial injustice has been effected. For your Lordships will not, after a decree has been pronounced, and prosecuted in the Master's office by all the parties interested, and after a decretal order has been made on further directions founded on the Master's report, be inclined to disturb what has been done, if it appears that the result is the same as that which would have been obtained if the suit had been framed according to the ordinary rules of the Court, more especially where, as in this case, no appeal was presented against the original decree until after all the inquiries had been prosecuted in the Master's office, no doubt at

great expense, and a report had been made unfavorable to the appellants, and where no injustice is done by acting on the decree actually made.

The *cestuis que trust* of the money secured by the bonds * 927 * might, at any time after the death of Robert Burrowes, senior, unless barred by the Statute of Limitations, have filed a bill against the obligees of the bonds, praying that the estate of Robert, the obligor, might be made liable to their payment. In the present case the suit was commenced by the *cestuis que trust* within two years of the time when their estate accrued in possession. As against them, therefore, the Statute of Limitations certainly could not have been set up by those who were their trustees. Suppose, then, that the *cestuis que trust* had filed such a bill against the personal representative of the surviving trustee of the bonds, and that a defence had been made that the money secured by the bonds had never been paid to the trustees, the question would arise whether this was occasioned by the fault of the trustees. But if the money never had been paid, then, whoever was in fault, the Court certainly might, if the interests of the *cestuis que trust* required it, have directed proper steps to be taken for recovering it from the representatives of the obligor, unless the Statute of Limitations would present a bar to any such proceedings.

Now, looking to what took place in the Master's office, it appears that no part of the money secured by the bonds ever was paid, but that the whole remains still due from the personal representative of Robert, the obligor. It further appears that the sum of 1500*l.*, part of the 5000*l.*, secured by the trust term of three hundred years (being that part of it which was secured for the benefit of the younger children of Robert Burrowes, deceased), was paid off by the appellant, Robert Burrowes, in the year 1844; but that the sum of 3500*l.*, residue of the 5000*l.*, has never been paid, and that it now forms part of the personal estate of Robert, the obligor.

Then as to the Statute of Limitations. Assuming that according to the enactments in the 40th section of 3 & 4 Wm. 4, c. 27, there is nothing now to prevent the personal representative * 928 * of Robert, the obligor, from enforcing payment of the 3500*l.*, the operation of the statute being excluded by what occurred in 1844, there would be assets in his hands sufficient to satisfy the claims of the persons interested in the bonds. And the only question then is, whether the Statute of Limitations affords

him a valid defence. That it would be a good defence at law, there is no doubt ; but the question is, whether it is a valid defence in equity ; whether, considering the position in which Robert the obligor stood towards these *cestui que trusts*, he is not to be treated from the first as a trustee, and liable to pay the money in question, as if it had been money held by him on an express trust for his grandchildren. If the Statute of Limitations presented an insuperable bar both at law and in equity to the plaintiff's demands, then, undoubtedly the bill ought to have been dismissed. But if that was not so, then, inasmuch as in a suit properly constituted, the same inquiries must have been directed and prosecuted in the presence of the same persons as were parties in this suit, I think the decree below ought to be sustained.

On this question as to the operation of the Statute of Limitations, the House is desirous of hearing a further argument by one counsel on each side.

[LORD WENSLEYDALE. — My Lords, the appeal against this decree was heard in the last session of Parliament, and the subject was very fully and ably discussed at the bar. On the part of the appellant, two objections were urged against the decree. First, that the suit was improperly constituted, and that there was no privity between the plaintiffs and the defendants, Robert Burrowes the younger, and his wife and children ; and, second, that the Statute of Limitations was a bar to this suit.

* On the part of the plaintiffs below, it was answered that * 929 there were circumstances to take this case out of the ordinary rules, and that as to the Statute of Limitations, the doctrine in the case of *Burrell v. The Earl of Egremont*,¹ applied, because the trusts of the term were trusts in favour of the obligees on the particular bonds, and the owners of the lands were the obligees ; and that, therefore, the statute did not apply, as the same persons were to pay who were to receive.

The main reliance of the respondents' learned counsel was on the position that the trusts of the terms were trusts in favour of the obligees. This position is directly contrary to that held, and I think very properly held, by the Lord Chancellor of Ireland. The trusts are, "forthwith, and as soon as conveniently may be," to raise 5000*l.* and interest, and apply it, in the first place, to pay

¹ 7 Beav. 205.

1500*l.*, part of it to the purposes of the marriage settlement of 1767 ; and, in the next place, towards payment of such judgment, and specialty debts, as were then due and owing, by Robert Burrowes the elder, in such order, course, and procedure as Robert Burrowes, his executors or administrators, might think proper ; and in case there should be any redundancy of the said sum of 5000*l.*, after such applications made, to pay the same to the said Robert Burrowes, his executors, administrators, or assigns.

I think the view taken by the Lord Chancellor of Ireland of this provision is perfectly correct. It does not apply to either of the bonds in question, because neither of them was due and owing, that is, payable at the time the settlement was made, within the true meaning of the words of the clause. They were debts due *in presenti* on the 3d of October, 1807, but only payable in

* 930 *futuro* ; and though a release of all * debts then due would have included them, it is clear, from the context, that those bonds only were meant to be provided for of which immediate payment could then be made, for the trust is “ forthwith, or as soon as conveniently may be ” to make the payment. Add to this, the trust is not for all bonds equally, but only in such order, course, or procedure as Robert Burrowes, or his executor, &c. should think proper ; and in case of any redundancy, after such applications, to pay it to Robert Burrowes, his executors, administrators, or assigns. Of what was then the amount of bond debts, I am not aware that we have any evidence ; but no individual bond creditor could be entitled to say there was any trust in his favour. He must have had an appointment from Robert Burrowes the elder ; and if no such was made, Robert Burrowes the elder was entitled to the benefit of the trust. In effect, it is a trust for Robert Burrowes the elder, and the 3500*l.* formed part of his personal estate. This point, therefore, on which the respondents mainly relied, cannot avail them.

I do not think it is necessary to discuss the question, whether the obligees of the bond, if the trusts had been in their favour, could have enforced the trusts of the term, to which they were not parties, though I do not feel any difficulty on that question. It was clearly a settlement for a valuable consideration, because Robert Burrowes the elder was a party to the settlement in 1807, and gave a valuable consideration for the trust in his favour, by settling his own freehold estate. Whether the obligees in the bond, if

they had been *cestuis que trust*, could have enforced it or not, it is quite clear that Robert Burrowes was a party to the contract, and it being for his benefit, he could.

The money thus secured is, therefore, a part of the personal estate of Robert Burrowes the elder; and if the sum secured by the term has not been satisfied (and it is quite * clear, * 931 so far as appears from the case, that it has not, and it was so found by the Master), and if the charge be not barred by the Statute of Limitations (and I think it was not), and if also the right of action on the bond is not barred, a suit, properly instituted, might have succeeded in the object of procuring a sale of the term.

The ground on which I think the term is not barred by the statute is, that the term constitutes a trust of lands within the meaning of the 25th section of the 3 & 4 Wm. 4, c. 27, as decided in the case of *Young v. Lord Waterpark*,¹ by the late Vice-Chancellor of England, affirmed by Lord Lyndhurst,² and approved of by Lord Cottenham and the Lords Justices, by Lord Cranworth and Lord Justice Knight Bruce, in the case of *Cox v. Dolman*.³ So long as the trustees have a subsisting term, on which they could recover at law, the trust against them could be enforced; and I conceive that the term is not barred as between them and the owner of the land, as it is in the nature of a mortgage, and part of the entire sum for which the mortgage was given, viz. 5000*l.* was paid in 1844, viz. the 1500*l.* already mentioned, and so the right is saved by the 40th section of the 3 & 4 Wm. 4.

But for the purpose of obtaining this object the present suit is not properly constituted. It ought to have been instituted against the personal representative of the deceased obligor (Robert Burrowes), the term being part of his assets, and there being no privity between his creditors and the trustees of the term, or the owners of the estate. The rule is perfectly well settled, as stated by the Lord Chancellor of Ireland and the debtors to the estate of the debtor against whom the claim is made (and the trustees of the term and the owner stand in the same relative position)

* cannot be sued, either alone or with the personal repre- * 932
sentative, with certain exceptions, collusion, for instance, between the executor and the debtor; partnership between the deceased debtor and others, and the consequent necessity to take the

¹ 13 Sim. 204.

² 2 De G., M. & G. 592.

³ 15 Law J., N. S., Ch. 63.

accounts. Neither of these exceptions is applicable to this case. Fraud is not alleged nor proved, nor is there any question as to partnership. There may be other cases, but I agree that the circumstance of the surviving obligee in the bonds, his executor being also owner in succession of the land, which was relied on by the Lord Chancellor of Ireland, interposed no difficulty in the way of the representative of Robert Burrowes the elder enforcing his remedy against the estate. I concur, therefore, with my noble and learned friend, that the reasons assigned by the Lord Chancellor of Ireland for holding the suit to be properly constituted cannot be sustained.

What then is the consequence? We have certain parties before us, and with the materials which the proceedings afford, we ought, though we may think the decree incorrect, to pronounce such a decree as ought, upon those materials and the substantial merits of the case, to be pronounced between the parties. But the question remains whether the Statute of Limitations is a bar to the right of action on the two bonds, by the personal representative of the surviving obligee against the personal representative of the obligor, for if so the plaintiff cannot succeed.

The right accrued in 1816, more than thirty-two years before the filing of the bill. It is not prevented from being barred by the circumstance that the party to receive and the party to pay were at any time the same, as I have already explained.

It was contended, however, that it was not barred because Robert Burrowes paid, up to nearly the commencement of the * 933 suit, the interest on 500*l.*, part of the sum of 1500*l.* * secured by the two bonds and appointed by Dean Gore to Mr. Sankey on his marriage. This point is left in a state of some obscurity. Robert Burrowes the younger, in the same answer, relies on the Statute of Limitations, and swears that no interest had been paid on the sum due on the bonds, nor any acknowledgment made in writing; and states that since his father's death he has paid interest on 500*l.*, the same having been returned by his solicitor as one of his father's debts, and he tendered, through his solicitor, the 500*l.* to Mr. Sankey; and he states that he paid interest on it, as on a debt due from the father, believing it to have been the amount of one of the bonds for 500*l.*, which his father had received as trustee under the marriage articles of 1806. And he further declares his readiness to pay the sum of 500*l.* to Mr.

Sankey. No other evidence is offered on this head, and I cannot consider that the statement proves the payment of interest on the bond by the party liable upon it, for Thomas Burrowes was in no way liable upon it, and if offered as proof that Thomas received 500*l.* from the personal representatives of the obligor, Robert Burrowes the elder, in part payment of both bonds, so as to take the case out of the statute on the ground of acknowledgment by part payment; there is no proof whatever of that payment having been made less than twenty years before the commencement of the suit; and the payment of any part of the principal money is negatived by the finding.

The result therefore is, that the bond is barred by the Statute of Limitations, the moneys secured by it having been due more than twenty years before the suit, and the claim not having been revived by constructive or real part payment within that time. And the plaintiff must be barred unless the bonds are taken wholly out of the operation of the statute on a totally different ground, which has occurred to *my noble and * 934 learned friend and myself, in considering this case, and which has not been argued at the bar. And that point must be discussed and settled before we can pronounce an opinion whether the decretal order ought to be affirmed or reversed, and if the former, what its precise terms ought to be.

There is no doubt that if the money due on the bonds had been received by the trustees they would have been liable to account for the trust money, and the Statute of Limitations would have been no bar. It does not apply to trusts. Can Robert Burrowes, the obligor, be deemed a trustee of the moneys payable by him under the bond, to the obligees, on the ground that being a party to the marriage settlement he had notice of the trust of the bonds, and became thereby a trustee of the moneys payable by himself; or on the ground that the trustees were guilty of a breach of trust by not calling in the amount due on them, and that he is to be considered as joining them in the breach of trust by not paying the moneys? This point, I believe, is new, and deserves to be fully considered.¹

¹ A second argument by one counsel on a side was directed. That argument was heard on the 13th of June in the presence of the Lord Chancellor (Lord Chelmsford) and Lord St. Leonards, in addition to Lord Cranworth and Lord Wensleydale, and instead of being confined to the question on the Statute of Limitations, was applied to the whole case.

Sir R. Bethell (*Mr. R. Palmer* was with him) for the appellants. — It is alleged here by the respondents that though the principal sums secured on the bonds were not payable till the death of Robert Burrowes the elder, still that they were, in the words of the settlement, “debts now due and owing,” and

that the money thus specially secured has never been
 * 935 * raised and paid. On the other hand, the appellants al-

lege that no part of these sums remains unpaid, that the circumstances which have occurred create the strongest presumption that they have been paid, and that consequently there is on that ground an answer to the claim in equity, but that if that presumption is not allowed, then that the claim is barred by the Statute of Limitations, 3 & 4 Wm. 4, c. 27, § 40, and 3 & 4 Vict. c. 105, § 32. This was plainly a charge on the assets of the obligor, which became payable immediately on his death, and ought to have been paid by his widow and representative, Sophia Burrowes. It is clear from the finding that the widow came into possession of a large sum of money on her husband's death, that this bond debt was never demanded from her, and that Thomas Burrowes, who came into possession of the estate, held it free from recognition of the title of any person claiming to have rights over it in the name of his father. This case is the opposite of *Burrell v. Lord Egremont*,¹ for there the Statute of Limitations was held not to apply, because there was no person who was entitled to demand the payment, no person who by the delay could be induced to suppose that the charge was abandoned or merged, and where the rent out of which the interest ought to be paid was receivable by and belonged to the same person who was entitled to the interest. In fact, there was but one person to make the payment, and that was the same person who was to receive it, and there was but one fund out of which the payment was to be made. The reverse of this state of things is the case here, and, therefore, the Statute of Limitations is applicable. These bonds formed no charge on the estate at all. Thomas Burrowes was the surviving obligee

of them, and all that he was bound to do was, if the bonds
 * 936 * had not been paid, to call on the personal representative
 of Robert Burrowes, the elder, to pay them. That representative, the widow, received ample funds to discharge them, no call was made on her, and therefore arises the presumption that

¹ 7 Beav. 205.

the bonds had been satisfied. There was a schedule to the deed of 1838 which mentions the previous deed of October, 1807, and describes all the lands granted by the foregoing settlement as being thereby subject to a charge for portions for younger children, but that is not sufficient to rebut the presumption of payment of the bonds, for they are distinct from those portions. The part of the answer relied on for the purpose of showing an acknowledgment of the debt by the payment of interest merely shows that the appellant without inquiring as to the nature of the demand, paid interest on a sum of 500*l.*, which his solicitor informed him was one of his father's debts, but which was not in the least degree identified as being the sum of 500*l.* secured by one of these bonds.

As to the constitution of the suit. Between the plaintiffs and the defendants there is no privity whatever. The bonds are not payable out of the proceeds of the term of three hundred years, but merely out of the general assets which belong to the personal representative of the obligor, yet the *cestui que trusts* of the bonds are made plaintiffs in equity against the owner of the estate itself. The personal representatives of Robert Burrowes the elder, are the only persons against whom proceedings to enforce payment of these bonds can properly be taken. A creditor of A. cannot sue B., his representative, and C., his debtor, unless he can show that B. and C. are colluding to defeat his claim. There is no evidence of such collusion here, nor of any demand made, nor of any facts which go to show the existence of any claim on the part of these respondents.

* *Mr. Rolt* (*Mr. Fleming* was with him) for the respon- * 937
dents. — The circumstances of this case do not raise, but rebut presumption of payment. It cannot now be denied that the term still subsists. Then *Cox v. Dolman*¹ applies, where it was held that a term created to secure certain annuities, being a subsisting term on which the trustees might obtain possession, the annuitant was not barred by a lapse of twenty years; *Young v. Lord Waterpark*² is to the same effect, and both are untouched by the decision in *Hunter v. Nockolds*.³ The words in the settlement creating the term for the payment of "such specialty debts as are now due and owing" are not affected by those which follow, and which give R.

¹ 2 De G., M. & G. 592.

² 1 Macn. & G. 640, 1 Hall & T. 644.

³ 13 Sim. 204, s. c. on appeal, 15 Law J., N. S., Ch. 63.

Burrowes the elder, the power to appoint their payment in what manner he may think proper. The non-exercise of a power which is coupled with a trust cannot affect the interests of those who are to benefit by the trust, *Brown v. Higgs*.¹ The case of *Synnot v. Simpson*² is a clear authority in favour of the respondents; the reason for not enforcing the trust there being, that the provisions of the deed merely constituted an arrangement made between father and son for the benefit of the father, and did not constitute a trust for the creditors. And no question can arise here, as it did there, as to revocation, for both the parties, in whom, it might possibly perhaps be contended, resided a power of revocation, are dead. In *Garrard v. Lord Lauderdale*³ the distinction was taken between a settlement for the mere payment of debts and one which embraced other purposes; and *Kekewich v. Manning*⁴ shows,

* 938 that in a case like this notice * of the trusts is not necessary.

And such a trust cannot be revoked, for though, as shown by Lord St. Leonards in *Synnot v. Simpson*,⁵ a trust for mere payment of money to creditors may be revoked; it cannot be so where it has been created for other purposes, though even where it is created for the benefit of creditors, if they have acted on the faith of it their rights are sacred. In this case, Thomas Burrowes was a creditor at law as obligee of the bond, but he was likewise a trustee and a party to the settlement. It is impossible to say that he had not notice, or that he can escape from the result of notice; and the evidence of Mr. Henry Cottingham shows that he, on behalf of Mr. Gore, received interest on the 1500*l.* during the life of Thomas Burrowes from a person named Tatlow, who was the agent of T. Burrowes.

[LORD WENSLEYDALE. — The statement is, that the witness received the interest from 1820, and that such receipt “continued for many years,” but there is no statement that it continued within twenty years before the suit commenced.]

That may be, but the evidence shows that the deed was acted on by all parties as a trust; and then it is not likely that Thomas Burrowes, who thus in one character paid the interest which was due to him in another, namely, as a trustee, would sue the mere debtor at law. The bonds themselves describe T. Burrowes and

¹ 8 Ves. 570.

² 3 Sim. 1, 2 Russ. & M. 451.

³ 5 H. L. Cas. 121.

⁴ 1 De G., M. & G. 176.

⁵ 5 H. L. Cas. 121, per Lord St. Leonards, 145.

J. H. Cottingham as "trustees named in the marriage settlement, bearing even date herewith"; and the condition of the bonds is for payment of the money to "the above-named T. Burrowes and J. H. Cottingham"; and the character of an express trust is thus stamped on the transaction. That trust cannot be weakened because the additional power is possessed by the trustees to sue on the bonds in a Court of law. The Statute of Limitations does not apply to an express trust, * *Wych v. The East India Company*;¹ so that though a trustee may allow himself to be barred from suing a third person, he will still continue liable to his *cestui que trust*. But even if this claim should be barred as to the general assets of R. Burrowes the elder (which is not admitted), it is not barred as to his special assets, and the trusts of the term still subsisting will furnish those assets.

As to the form of the suit, it is clear that the circumstances of this case, the particular situation of some of the parties, and the circuitry and multiplicity of legal proceedings which would have arisen had any other suit been instituted, render this suit, which has brought before the Court all the parties really interested, quite justifiable.

Sir R. Bethell, in reply. — There are two propositions in this case on which the appellants rely: first, that since the 3 & 4 Vict. 105, § 32, no action can be maintained on these bonds against the personal representative of the obligor. Secondly, that no suit or proceeding can be maintained by the trustees of the term of three hundred years against the inheritor of the estate to raise the residue of the 5000*l*. *Young v. Lord Waterpark* has nothing to do with the case; there is no doubt that as between trustees and *cestui que trusts* the Statute of Limitations would not run; then these are not the parties before the Court; and the term is useless as against the inheritance. The terms of the 40th section of the 3 & 4 Wm. 4, c. 27, certainly embrace a case like the present; so that if this was a charge on the land, delay is now an answer to its enforcement. The part payment here relied on will not take the case out of the operation of the statute, for to do that it must be a part payment "by the person by whom the same is payable to the person entitled thereto," and it must be *940 "of the principal money, or the interest thereon." Here

¹ *Lewin on Trusts*, 721.

the evidence gives the payment no distinct character, so as to bring it within the words of the statute. It is merely a payment by this appellant of interest on some debt of his father; but it is not shown to be the debt claimed as due on these bonds. The interests in respect of the 1500*l.* and the 3500*l.* were not identical, but different. The power to raise money by virtue of the term is therefore gone, for as the 5000*l.* were to be raised for two different purposes, the payment of part, applicable to one of these purposes (notwithstanding that the whole might be recoverable under one covenant), would not be payment preventing the application of the statute as to the other part which was applicable to a different purpose. The bonds were payable out of the personal assets of the obligor, and were recoverable by action; payment should have been enforced against his widow, who possessed herself of his personal assets to an amount far more than was required to satisfy these bonds. It must be presumed that that was done. The provisions of the English Statute, 3 & 4 Wm. 4, c. 42, § 3, have been adopted in the 3 & 4 Vict. c. 105 (which relates to Ireland), and by which it is enacted that "all actions of debt upon any bond, &c. that shall be brought after this Act shall commence, shall be sued within twenty years after the cause of such action, but not after." The creditors on these bonds are therefore barred; for they are not entitled to a charge on the term, but are mere bond creditors of R. Burrowes the elder, and their right is barred by the statute.

1858. June 11.

THE LORD CHANCELLOR (LORD CHELMSFORD), after very fully stating the facts, said: On the appeal before your Lordships, the principal questions raised appear to be: first, whether the demand upon the bonds was or was not barred by the Statute of

* 941 * Limitations, 3 & 4 Wm. 4, c. 27, § 40. Second, whether any charge was created in respect of them on the trust term of three hundred years in the settlement of 1807; and if so, whether that term must not be presumed to have been satisfied. Third, whether the suit was rightly instituted in respect of the parties to it.

Upon the first question as to the Statute of Limitations, there can be no doubt that if the bonds are to be regarded as merely creating the relation of obligor and obligee at law, Robert Burrowes the obligor having died in 1816, the time had long run

against the claim before the institution of the suit in 1848. But it is contended that Robert Burrowes was not merely an obligor liable at law upon these bonds, but from the circumstances with which they were connected, he was in the situation of a trustee in respect of the money which they represented. On the treaty for the marriage of his daughter with the Reverend Mr. Gore, Robert Burrowes agreed to give 2000*l.* as a marriage portion; 500*l.*, part of the said sum of 2000*l.*, to be paid immediately after the solemnization of the marriage, and the sum of 1500*l.*, being the residue of the sum of 2000*l.*, was to be secured in the manner already stated.

The bonds were given to Thomas Burrowes and Cottingham expressly as the trustees named in the marriage settlement. Robert Burrowes was a party to the settlement by which this money was settled upon his daughter and Gore, and upon their children. The bonds entered into and formed part of the settlement, and they may be regarded only as the machinery by which Robert Burrowes was to perform his part of the marriage contract, by providing a sum of money to be settled upon his daughter and her husband, and upon their children. To show his sense of the obligation which he had incurred to provide this portion for his daughter and her husband, by his will dated * in * 942 November, 1807, he says: "My reason for not limiting and appointing larger parts and proportions of the said sum of 1500*l.* unto and for my said married daughters is, because on their respective marriages I paid and secured to each of them and their respective husbands a portion or fortune of two thousand pounds sterling."

Now if a trust in respect of the 1500*l.* secured by the bonds was created by the settlement of 1806, it is immaterial whether the remedy upon the bonds themselves was barred by the Statute of Limitations, because the *cestui que trusts* would have had the double right either to enforce their claim at law through the bonds, or to institute a suit to obtain relief in equity against any estate of Robert Burrowes the obligor. There is even some doubt whether the Statute of Limitations was not saved by payment of interest upon the bonds after the death of Robert Burrowes the obligor. But the evidence upon that subject is not sufficiently clear as to the period down to which this interest was paid to render it safe to rely upon it.

But it must be remarked that the objection of the Statute of Limitations is not raised by any party who is entitled to take advantage of it. Robert Burrowes, the appellant, by his answer says: "After the most diligent inquiry he has been able to make, he cannot discover that the existence of the said bonds was ever recognised as against the said estates or any part of them during the last thirty years." This may be taken to be a sufficient reference to the Statute of Limitations to have entitled him to insist upon that defence, but he was not the representative of the obligor but of the obligee, and could only be admitted to protect himself by the statute if the bonds had been a charge upon his estate. It is alleged by the respondents that this was the case, and that whatever may have been the nature of the original relation in * 943 which the parties stood to each other,* by the transactions of the bonds and the settlement of 1806, and by the subsequent settlement of 1807, and the creation of the trust term of three hundred years, the parties beneficially interested became entitled to a charge upon the property which they could enforce by their suit. I have a very strong impression that it was the intention of Robert Burrowes to provide for the payment of the specialty debts which he had contracted the year before by means of this trust term; and if judgment had been entered up on the warrants of attorney, perhaps the bond on which interest was payable from the date might, without straining the meaning, have been brought within the words which he used. Yet I agree that, judgments not having been entered up, these bonds do not come within the description of "specialty debts now due and owing," and, therefore, are not a charge upon the term.

But it is quite clear that the 3500*l.*, part of the 5000*l.* to be raised under the trusts of the term, formed part of the personal assets of Robert Burrowes. It was argued on the part of the appellants that it must be presumed that this sum of 3500*l.* had been discharged, as no notice had been taken of it for more than twenty years, and as Robert Burrowes by his will mentions the 1500*l.* for the portions of his daughters in his marriage settlement of 1767, and also the 3000*l.* which he had the power of apportioning by the settlement of 1807, and says nothing of the 3500*l.*, the residue of the 5000*l.* Very little stress, however, can be laid upon the will as affording a presumption that the 3500*l.* had been paid, as the will is made only a month after the settlement of

1807. The silence as to this sum down to 1836 may have been occasioned by the fact of Thomas Burrowes, who was in possession of the estates, and liable, therefore, to have the 3500*l.* raised against him, being also the obligee in the bond, and entitled out of *that sum, as part of the estate of Robert * 944 Burrowes, to pay himself, or to be paid, the 1500*l.* And the Master expressly finds that the residue of the said sum of 5000*l.* is still unraised.

If, then, there was a trust originally created, and there is a sum still to be raised out of the three hundred years' term, and the proper parties are before the Court, the decree can be supported.

The only question which remains is as to the constitution of the suit. Now this is very much blended with the former questions. If the only liability was upon the bonds, then there would be no privity between the obligor and the *cestui que trusts* of those bonds. The case is considerably embarrassed by the double relation in which Robert Burrowes, the appellant, stands as obligee and trustee, and also as owner of the estate. The proper proceeding would have been for the trustee to sue Mrs. Caulfield, the owner of the three hundred years' term, to compel her to raise the 3500*l.* out of the estate, and then to apply it in satisfaction of the claims of the *cestui que trusts*. But the position of Robert Burrowes creates a difficulty in the way of this proceeding; and as the question appears ultimately to resolve itself into one of trust, in which the respondents are the only parties really interested, the Lord Chancellor was right in saying that the special circumstances took the case out of the ordinary rules as to parties; and as the respondents are entitled to the trust fund, and all persons are before the Court who could be interested in the result of the decree, I think the technical objection as to the constitution of the suit must fail, and that the decree and the decretal order of the Lord Chancellor are substantially correct, and I submit to your Lordships that they ought to be affirmed.

* LORD CRANWORTH. — My Lords, I have already troubled * 945 your Lordships at some length in stating my view of this case upon all the points except one, namely, how far the Statute of Limitations did or did not present an insuperable bar to the claim of the plaintiffs. I stated on the former occasion, in concur-

rence with what has now fallen from my noble and learned friend, that I thought it was clear that the term of three hundred years was still a subsisting term, available for the purpose of raising so much of the sum of 5000*l.*, secured by virtue of that term by the settlement of 1807, as had not been already raised, and that the Statute of Limitations presented no bar to the raising of that residue. In the argument which took place subsequently to my delivering that opinion, the question was raised, whether all power of raising money by virtue of that term was not gone, because the sum of 1500*l.* was to be taken, as it were, as a separate charge, and that what remained was a different charge, and that, in respect of that, the statute would present a bar. But in my opinion that argument cannot be sustained, because the trust of the term was, that the trustees of the term should raise one sum of 5000*l.* The mode in which they were to appropriate it was a matter between them and those who were beneficially entitled. Now, they did raise 1500*l.*, part of the sum of 5000*l.*, in 1844, long before the Statute of Limitations could begin to operate, and I think that clearly kept alive their right to raise the residue. I so expressed myself on the former occasion, and I only advert to it again for the purpose of showing that I have not been inattentive to the argument which has been offered, and which has failed to convince me that I took an erroneous view of the subject.

I should also add, that upon that occasion I expressed my opinion, that the constitution of the suit afforded no
* 946 * objection to the decree. I stated, and I am inclined to adhere to that, that in my opinion the suit was not in its origin properly constituted. But I pointed out, that if it had been in the strictest way properly constituted, if it had originally been commenced as a suit merely against the representative of the surviving trustee, that must have led to a proceeding by him to raise this money; and again, that must have led to a suit being instituted to bring in all the same persons who are now parties before the Court. There would have been two suits instead of one, but the result must have been exactly the same. And inasmuch as no objection was made in the first instance to the original decree, and as the inquiries were all permitted to go on in the Master's office (no doubt at great expense), and as the same result has been arrived at as would have been reached in a suit properly constituted, and without additional expense, I do not think your

Lordships ought to interfere, merely because it has been arrived at in a way not strictly conformable to the practice of the Court. I have assumed it to be not strictly conformable to the practice of the Court, but I think in the course of the argument my noble and learned friend, whose experience on this subject is greater, perhaps, than that of any other living man, seemed to doubt whether it was improperly constituted. - But that does not seem to be at all material. If it was properly constituted, then *cadit quæstio*. If it was improperly constituted, still, eventually, all the same persons have been brought in as parties to the litigation, and the same results have been arrived at as if it had been strictly regular.

The result of all that is, that the personal representative of Robert Burrowes is now entitled to the 3500*l*. Then arises the only question which we have now to consider, upon which I gave no opinion upon the former occasion ; namely, whether that being so, — inasmuch as the obligees in * the bonds could * 947 not sue the personal representative of Robert upon those bonds, because to such a suit the Statute of Limitations would have presented an insuperable bar, — whether, I say, the present plaintiffs, the *cestui que trusts*, are equally barred. I have formed a strong opinion, and have entertained it throughout, that they are not, and for this reason : I think that, from the beginning, Robert Burrowes, the father of Mrs. Gore, was liable to be treated in the contemplation of a Court of equity as a trustee. A trustee for whom ? For all the persons beneficially interested under the settlement in their successive order ; that is, a trustee for Mr. and Mrs. Gore during their lives, and afterwards for the children of the marriage, who are always, in a Court of equity, treated as purchasers for value. The question is, whether I am right in that, that the father was from the first to be dealt with as a trustee of this money. I came to the conclusion that he was, upon several grounds. In the first place he begins by stating in the marriage settlement, — which (if that is material) seems to have been executed before the bonds, — he begins, I say, by stating, what no doubt had been agreed to before the settlement was executed, that he had agreed to give 2000*l*. (we will call it 1500*l*., because the sum of 500*l*. was paid at the time of the marriage) as a portion for his daughter, to be settled in the mode he mentioned. And then he agrees, in order to secure the 1500*l*., to give two bonds,

one for 1000*l.* and one for 500*l.*, there being different times at which interest is to become payable upon those two sums.

Let us, then, go by steps. Suppose he had simply agreed that he would give 1500*l.* to be so settled as a portion, he would then have been dealt with as a trustee, because, if a person agrees to give a sum of money as an inducement to another to marry * 948 his daughter, and that marriage takes * place, in that case the parent who so agrees to give the money is considered as holding the money upon trust. Is, then, that varied by the circumstance that he agrees to secure it by bond? Suppose he had never given that bond, still he would clearly have been a trustee, or subject to the liabilities of a trustee. How is his liability altered by his giving a bond? That gives an additional, and, in ordinary cases, a more easy remedy for the recovery of the money; but still he cannot absolve himself from his liability as trustee. The purchasers under the marriage contract are entitled to say, "Till you have paid the money, you have not discharged yourself of your trust."

Now, supposing the trustees had not been named, and that it was simply an agreement that he would give bonds to trustees, that would have made no difference. The trustees have here executed the settlement. But, suppose they had not executed the settlement, and that they had repudiated the trust altogether, could the father have got rid of his liability, because there were no trustees? It is clear, upon familiar principles of equity, that he could not have been heard to set up such a defence. So again, suppose he had paid the money, and had borrowed it again, could there be any doubt that he would have been liable as a trustee? He would have got the money into his own hands. In short, can any thing absolve the father except the paying of the money? If so, the agreement to give bonds would put the father in a different position from what he would have been in if there had been no such agreement. If there had been no such agreement to give bonds, he would have been directly responsible for the money; as he did, according to the terms of the settlement, agree to secure the money by bonds, it would have been a good payment on his part, even against the *cestui que trust*, if he had paid the money to the * 949 trustees. But * that appears to me to be the only mode in which an agreement to secure the money by bonds affects the question.

My Lords, that being so, I shall not trouble your Lordships by going over again that which I stated at some length when the matter was formerly before the House, more especially after the full manner in which my noble and learned friend has restated, or rather stated afresh, the case, for he was not present at the argument upon the former occasion. I then explained the view which I took upon all the other points of the case, except this with regard to the Statute of Limitations. As regards the Statute of Limitations, that defence is, in my opinion, inapplicable, because though the money was secured by bonds, that was only an additional mode of securing the discharge of what I consider to have been a trust, which trust is not discharged until the person who enters into the obligation, and who is in the nature of a trustee, has discharged it by the actual payment of the money. And there can be no doubt that no other legal defence could be suggested as an answer excepting the Statute of Limitations. A release would have been just as good a defence if it had been executed the day after the bonds had been entered into ; so accord or satisfaction, or many other legal defences, might have been perfectly good discharges at law, but no one would have contended that any one of those would have been applicable in equity. And the Statute of Limitations is inapplicable, exactly upon the same ground, because the person who was to pay the money to the trustees was liable for something beyond his mere legal obligation, and that something beyond can only be got rid of by actual payment of the money.

* LORD ST. LEONARDS. — My Lords, this case certainly, as * 950 my noble and learned friend has stated, involves very nice questions of law. The bonds upon which the claims are founded expressly state that the obligees are trustees, and therefore if the case had rested upon that, without the settlement, certainly in a Court of equity it would have amounted to an agreement by the father to make a settlement.

The case of *Logan v. Wienholt*, which was in this House,¹ went to a very considerable extent, but not beyond the principle of equity applicable to it. The bond there, I think, was given upon the marriage of a niece, in a penalty of 4000*l.* to secure a sum to the niece equal to whatever the obligor should leave to any other person. In the result, the sum payable under that agreement

¹ 1 Clark & F. 611.

amounted to a very large sum indeed, greatly exceeding the amount of the penalty, and there it was insisted that the bond was the measure of the obligation, and that no more than 4000*l.* could be recovered. But this House held, adopting the opinion of Lord Eldon, that there was an agreement made by the bond, and that the bond was merely a mode of securing the agreement or contract of marriage to settle that particular sum, and that therefore the whole sum was recoverable.

Now we are not called upon here to consider that point, because the settlement which followed the bonds expressly states the father's agreement. My noble and learned friend near me thinks that the settlement was before the bonds, but I rather think they are contemporaneous, they are one transaction ; and it is difficult * 951 to say which was * first and which was last ; the agreement here is expressly stated to be to provide a marriage portion for the daughter.

Now I confess, with very great submission to my noble and learned friend, that I have some doubt about the relation which was imposed upon the obligor. I am not prepared to say that, in my opinion, it constituted the father a trustee. It is rather difficult to say how he is to be a trustee of his own property. If he had agreed to give his own estate, or any tangible thing that was actually marked out, then of course he would have become a trustee, because he would have agreed to give and settle that identical property ; but if he agrees to pay a sum of money out of his general assets, I do not see how that can constitute him a trustee to bind him in all respects in that relation. But it does bind him to this extent, it binds him as entering into a contract to be performed, regardless of the particular obligation given to secure it. Then, what may be the effect of the Statute of Limitations or any other statute upon that relation, is rather a distinct question from that which we should have to consider if you established that the father, from the moment of the execution of the bond, is a trustee of a particular portion of his own property for the daughter and her husband and children. But I do not myself consider that it is necessary for your Lordships to establish that point in order to decide this case. The bonds were to be accompanied by judgments, and warrants of attorney were given to two attorneys to enter up judgment in the next term, or any other term, to secure the moneys ; and Thomas Burrowes, the son of Robert, the obligor,

and subsequently his personal representative, and the father of Robert, the grandson (who is now the appellant and his father's representative), was co-trustee with Cottingham in these bonds, and survived that person.

* It is said that we have no proof that there was any * 952 judgment entered up upon either of those bonds. It was a breach of trust clearly and undeniably on the part of the obligees not to enter up judgment. It is a breach of trust which Robert Burrowes and his representative never can take advantage of. Therefore in a Court of equity it is perfectly clear to my apprehension that these must be treated as judgment debts of the father's, which would have been regularly made judgment debts if there had not been a breach of trust on the part of the trustees, who ought to have entered up the judgment. Nothing can be more clear than that Thomas, and his representatives, would be answerable for a breach of trust if any damage was sustained in consequence of their not entering up judgment.

The settlement of these moneys contains some provisions which are of considerable importance in relation to the decision of this case. In the settlement, after reciting the agreement to settle the portion, and so on, and settling it, there is this clause: "And it is also further declared and agreed upon by and between the parties to these presents, and it is the true intent and meaning thereof, that in case it shall be advisable in the said trustees, after the death of the said Robert Burrowes, to call in said two sums hereinafter mentioned, the said Thomas Burrowes and the said James Henry Cottingham, or the survivor of them," (and so on), "shall lay out the same upon and subject to the trusts aforesaid on such security or securities as the said George Gore and Anne Burrowes shall direct, appoint, and approve of." And at the end of the settlement you find a very singular provision: "It is agreed upon by and between all the parties to these presents that they, the said George Gore and Robert Burrowes, their executors," (and * so on), "will at all times hereafter when thereunto after- * 953 wards required by the said Thomas Burrowes and James Henry Cottingham, or the survivor of them," (and so on), "do and execute any further and other act and acts, thing and things, deed and deeds, conveyances and assurances in the law as shall be necessary for the purpose of conveying and carrying the provisions and stipulations aforesaid into effect."

These two provisions satisfy me of two things. First of all, that the securities by the bonds and the intended judgments were considered as permanent securities upon the estate of Robert Burrowes. We all know that at that period, and, indeed, at a much later period, it was one of the great peculiarities in Ireland that judgments were considered equal to conveyances, and they were made for centuries together the subject of settlements and left upon the estates, and considered perfect provisions in marriage settlements, and dealt with as if they had been regular mortgages. These parties, therefore, did not at all anticipate that the money would be called in in the lifetime of Robert Burrowes, for there was an express provision that in case it should be advisable to call it in after his death they would lay it out in new securities. And the covenant to execute all deeds and conveyances and assurances points to that which is perfectly clear to me, that the parties intended the portions to be secured upon the estate, and considered that they were so secured, and that therefore they were to execute such further deeds and conveyances as should be required, which would be nonsense as to a money payment. You do not want deeds and conveyances for a money payment. Conveyances for what? Deeds for what? For the bonds. Those bonds were made a specialty debt to be a security for money; therefore what

they really meant was to secure it upon the estate, not to
 * 954 * compel the trustees to call in the money either during the lifetime of Robert or after Robert's death, but to empower them to use a discretion in that respect, and, if they did call it in, to lay it out in other securities.

If that was so it would be very difficult to maintain that the Statute of Limitations could prevail even against a bond; certainly not in a Court of equity. Therefore I need not trouble myself, and your Lordships need not trouble yourselves, about the legal right. But I have great doubts as regards the bar even at law, because interest was unquestionably paid, in my apprehension, upon the whole debt, up to the death of Dean Gore. By whom it was paid may be a question; if further inquiry should be necessary that might be made out, but I must take it for granted that it was paid by those who by law were bound to pay it. But you will find that it is an agreed point in the pleadings in this case, that the interest was paid; it is impossible to doubt it upon looking through the amended bill (I exclude purposely the evi-

dence which may enlighten one a little — I lay it on one side, though I cannot quite forget it) ; but in the amended bill I find it expressly charged that the interest was paid upon this whole sum up to the death of Dean Gore in 1846. The bill was filed in 1848. What is the answer to that? An answer is put in to the amended bill, and in that answer Robert Burrowes is perfectly silent in regard to that charge ; he does not answer a single word in respect to that. And I must consider, looking at this matter with a judicial eye, that there was no answer to be made to that charge. The Master by his report finds that interest is due from the death of Dean Gore. Why from that date? Because he was tenant for life, and the amended bill charged that the interest had been satisfied up to that time. The Master, by making that report, gave an opportunity to Robert Burrowes to prove, if he could by affidavit or otherwise, the * payment of the *955 capital sum. Robert Burrowes did not avail himself of it. He took no step. He found no fault at all with the statement that interest was due. There was no exception to the Master's report on the ground that the Master found that the interest was paid up to that time, and that he ought to have found that no interest was due. That fact, which was certainly a damaging one to the case of Robert Burrowes, was acquiesced in, namely, that interest upon the whole sum was paid up to the death of the tenant for life.

There is one material point in this case, which perhaps has not received due attention ; it is this : When you talk of the Statute of Limitations, the question immediately arises, When did the right of these respondents accrue? It never accrued till the death of Dean Gore in 1846, and they file the bill in 1848. Therefore to talk of the Statute of Limitations here is a farce, because their right did not accrue till the death of Dean Gore. Although I feel the greatest deference and respect for the opinion of my noble and learned friend, I am afraid of putting it upon the ground of Robert Burrowes being a trustee in every sense, and therefore I do not venture to go so far, but as regards the Statute of Limitations it becomes, as I say, a farce when you see what the facts were ; that Dean Gore being tenant for life of the fund, and Thomas being trustee of the fund, these parties have to get at that which Dean Gore enjoyed, or did not enjoy, for I am perfectly indifferent whether he received a shilling or not. At the death of Dean Gore, and not before, the right of the children accrues. And then

Robert Burrowes, as the representative of Thomas, is called upon, "Pay now what you have agreed to pay to the children." Now what is the position of Thomas Burrowes and of Robert as his representative? He ought to have the 1500*l.* in his hands ready * 956 to be paid over to the * respondents; he is liable in a Court of equity as having committed a breach of trust in not having that money forthcoming. I never was more surprised than at hearing his defence. No trustee can say as a defence, "I have committed a breach of trust." I never was more surprised than I was to read that as one of the grounds of defence; it must have slipped from the pleader in some odd way or at some odd moment. He actually sets up a breach of trust as a defence. In his answer Robert Burrowes says that he believes the sums in the bill sought to be raised have been in part paid or been lost through the default of the trustees to the settlement so executed at the marriage of the said Honourable and Reverend George Gore and Anne Burrowes, or one of them. Lost by the neglect of the trustees! Who are the trustees? Why he himself is a trustee at this moment before your Lordships' bar. He is the representative of his father Thomas, who was himself a trustee. How is it possible for him for a moment to be heard to say, "I have lost the money by my breach of trust"? The answer should have been, "If you have, you will be so good as to pay it." That would have been a short way of dealing with it if the decree had been framed with a little more consideration when that defence was set up. If I had originally had to decide this case, I should have made very short work of it. I should have said, Very well, if the money is not forthcoming, then it is a personal payment due from you, and I shall order you to pay the money, if you cannot raise it under the term. That would have been a clear answer to this defence. And I have no doubt, therefore, as regards the bonds, without venturing to say whether there is a legal obligation to such an extent that the statute has not barred them. I have, however, a strong impression on the subject, looking at the fact of the * 957 payment of interest, and coupling with that the * payment in 1844 of part of the capital, as to which I entirely agree with my noble and learned friend, that it is impossible to dispute the fact of the payment of interest upon the 1500*l.*, and the payment of 500*l.* as part of the 1500*l.*, which 1500*l.* is part of the 2000*l.*, and the 2000*l.* is the whole marriage portion. How can a

man who has paid interest upon the very sum, and has paid part of the capital, be heard to say that the claim is barred for want of some acknowledgment. There is no case to justify that. And therefore in that point of view it would, to my apprehension, be impossible to say that the bonds were actually barred even at law. But these parties have not to stand upon that alone. This is a case in which a man having agreed to settle a portion upon his daughter and her husband, and after their deaths, upon their children, the children now come forward and say, We demand our portions, which were agreed to be settled upon us, and here is our trustee. He replies, "The money is lost by neglect of the trustee whom I represent." Upon these grounds I submit to your Lordships that there can be no doubt of their rights to receive that money out of some fund, and that fund must of course be the property originally of Robert Burrowes. And I think that in a Court of equity this agreement (without entering into the question of the character of the trust) is a contract which is now subsisting unbarred by the Statute of Limitations, and that the trustee who wishes to set up this defence is himself liable to pay the money.

It was argued very forcibly by Sir Richard Bethell that this was a case in which you must presume payment. I have looked very anxiously to see whether that could be maintained; but the moment I saw that the right of these parties did not accrue till 1846, and that the bill was filed in 1848, I had not the slightest doubt about it. Although *it was very ingeniously ar- *958 gued, I cannot think that it is an argument to which any weight can be given. Therefore I am forced to hold that the money is still payable, and that there is no defence, at all events in equity, against the demand now set up.

Then comes the question, Out of which fund is it to be paid? With regard to the settlement in 1807, which provided the term of three hundred years, I have already shown to your Lordships, that in my apprehension these bonds were good judgment debts in equity, and that they would be treated as charges upon the estate upon the ground that equity would not allow the security agreed for upon the marriage to be diminished or damaged by the mere neglect of the trustees. And if it would not allow that in an ordinary case, I shall presently show your Lordships that it could not possibly allow it in this case. By that settlement the term was created,

and there was a power given to Robert Burrowes to raise the sum of 5000*l.* for his own purposes, and there were contemporaneous instruments executed by Robert Burrowes. He made the settlement of 1807, he made the charges immediately under that settlement, all within a day or two, and then he made his will ; and in his will is that clause, stating the reason why he did not provide for his married daughters, namely, that he had already paid or secured portions to them. So that when he made his will, he was in the belief that he had secured to his daughters those particular portions. Now as to the portions themselves, the facts have been stated to your Lordships, the portions have been dealt with and kept alive by the appointment executed by Dean Gore. This is not a case in which the property has been lost sight of. It is not a case in which the parties have abandoned their interests, Dean

Gore, under a special power, appoints a portion of this very * 959 fund to one of his children in 1834. And in 1839 * he, in effect, appoints the residue to another. So that the parties have been active and diligent in keeping their claim alive. There is a vitality in this claim, it has not been a dormant thing. It has been urged from the first instant that the right accrued, and it has been dealt with, I may say, down to this moment. The sums so appointed were settled upon the marriage of parties existing and claiming them at your Lordship's bar. What could the parties do more ? The thing was not tangible, it was not like an estate in land, that you could live upon or get possession of, but it was a sum to be settled. Now by that settlement, the first term of three hundred years overrides the life estates, and those life estates are to Thomas and to Robert, and to the children, and to the wife who died. The term is to raise a certain sum of money. Sir Richard Bethell argued that you are to consider this as if it was so many distinct claims. I cannot do that. It is not to raise 500*l.* for A., and 500*l.* for B., and 500*l.* for C. as distinct claims, but it is one sum ; he, the settlor, having the power to settle the estate chooses, out of the corpus of the estate, to reserve to himself 5000*l.* for his own purposes. Therefore this sum of 5000*l.* is to be raised, and the interest of it is to be dealt with in this way. First of all he says there are portions upon the estate. Those portions are for my own daughters, I will therefore out of this 5000*l.* pay my own younger children's portions ; I will free my estate from that, and then I will pay the judgments and the specialty debts now due and owing, in

such order as I shall think fit, and then the residue shall form part of my personal estate. The only proviso for the cessor of that term is the proviso for a cessor when the money is paid. When what is paid? When the sum of 5000*l.* is paid. Therefore, in point of law, nothing short of the payment of that money will destroy that term under the settlement. If you are to destroy

* that term under the settlement, it must either be on some * 960 presumption of surrender, or it must be by virtue of the Statute of Limitations. There is no presumption of surrender, as I have already stated; there can be no presumption of surrender; it would be a breach of trust. Part only of the money has been paid. There could be no surrender of the term, if it was only upon the admission of Robert Burrowes in his answer, that he has paid interest upon the 500*l.*, part of the money, and that he is still ready to go on paying the interest, and is ready to pay the principal. He says that he was told that it was one of his father's debts. So it was one of his father's debts. He was told rightly. It was not an original debt of the father, but he was responsible for it as a trustee, who ought to have got in the money. He was responsible for it because he had the fund, that is the estate, out of which it was to be paid. The presumption of surrender therefore is entirely out of the question.

Now, as to the Statute of Limitations, how is it possible that that can affect this term? If the statute could have any application to it, the answer would be, first of all, that of the 5000*l.* part was paid in 1844. It is perfectly clear that that part, namely, the sum of 1500*l.*, was paid under the old settlement of 1767 (I have looked into the deed, and Sir Richard Bethell was quite correct in so stating it), there is no doubt it was; but as that sum of 1500*l.* was provided for by the settlement of 1807, and was a portion of the 5000*l.*, it was to be dealt with by itself, without satisfying *pro tanto* the trust of the term of three hundred years for raising the 5000*l.*, because, if not so, after that payment, the other money never could be raised.

Observe the difference: if there had been a payment by the tenant for life, no doubt that charge would have been kept on foot. If that had been a payment simply under * the set- * 961 tlement of 1807, it would have been kept alive, because the tenant for life would not have been bound to pay it off. But as a portion of the 5000*l.* secured by the term of three hundred years, it was totally different. The payment of the 1500*l.* was *pro tanto* an

exoneration of the estate, and a part execution of the trusts of the term.

The Statute of Limitations is very singularly framed with regard to matters of this nature, for in the earlier sections it only provides for trusts which affect the land or rent. But take land only ; it bars claims to land. But when you come to those sections which were relied upon, section 40, and so on, as to charges upon land, you have then no corresponding section with regard to trusts as to such charges. If, therefore, this had been an express trust as regards land itself, a trust of so much land as would represent 1500*l.* or 2000*l.*, then the Statute of Limitations would have directly saved that trust under section 25, which saves express trusts as to land, and until there had been a sale by trustees, time would not run. Here there has been no sale by trustees, and therefore time would not run. There is always a difficulty in applying the statute when you come to trusts, not with regard to land itself, but with regard to charges upon land ; but, however, I consider it perfectly settled, and rightly settled, that the construction is the same as to charges in either case. The old rule prevails : I think it is perfectly settled that the effect of a charge of this nature, to be raised by express trust, falls within the saving as much as if the express trust had been applied not to charges upon the land but to the land itself.

Well then, if that be so, here is an express trust to raise 5000*l.* to pay off the 1500*l.*, and to pay off such judgment or specialty debts as may be charged as debts to be raised from personal estate, subject to express trusts. * There is nothing to interfere with the execution of that trust ; no adverse possession ; the money is acknowledged to be due, not only by paying off in 1844 the 1500*l.* part of it, but by the admission in the answer, which has not been retracted, in which Robert Burrowes says that he is, and always has been, ready to adhere to the payment of the interest of the 500*l.*, and he expresses his readiness to pay the 500*l.* itself, which is part of the 3500*l.* which is the whole demand.

But then Robert Burrowes says, this may be a charge, but it must not be a charge upon my land. The land is mine, I am tenant for life under the settlement, and you are not to charge my land. Now let us consider for a moment in what situation he stands : Thomas, his father, was trustee of the charge upon the

land, which, in my opinion, bound the land on the ground which I have stated. I think it was an equitable charge upon the land. I will not enter into the question whether the judgments, if entered up, were such judgments as would be charged upon the land under the trusts of the term, or such judgments as would be binding upon it, because I think the result is the same; therefore it would be useless to discuss a very nice point. Let us see, therefore, the situation in which Robert Burrowes stands. His father, Thomas, was trustee of these sums, and was bound to enforce payment of them out of the land. Besides the original charge to which I have referred, he was himself subject to a term of three hundred years, which was to raise money to feed the assets of Robert, who had agreed to make the settlement on his daughter's marriage, and therefore, if those assets were wanted, there was nobody living who ought to have been so eager and so ready as Thomas, and his son Robert after him, if it had been neglected, to enforce the payment of the money. As I have already shown your Lordships, *Thomas stood himself answerable for every shilling *963 of the money as trustee; but could he, though trustee, merely because the estate vested in him subject to the term, enjoy the estate out of which the trust money was payable without being himself accountable for the money? For every shilling of the money which he received as tenant for life, the estate being charged with the trust which he, as trustee, was bound to see executed, he was responsible. His son, Robert, who is now the appellant at your Lordships' bar, stood exactly in the same position. He was tenant for life. The estate, as a life estate, was burdened with the payment of this trust money; every shilling that he received he was responsible for as a fund to provide for the payment of that trust debt; and it was a breach of trust on the part of each and of both of them not to raise the money without any contention at all, and not to have the money now in their hands ready to hand over to their *cestui que trusts*.

Observe what circuity of action there must be if this decree should not be maintained. It would be a disgrace to any Court of law or Court of equity to say that the parties were to be driven to that circuity. See what would happen. Robert Burrowes would have to proceed against the personal representative of his grandfather in order to obtain payment of these moneys, treating them really as specialty debts under an agreement. The personal representa-

tives, the trustees of the bonds, would have to proceed against the trustees of the term to raise assets. The trustees of the term would then have to proceed against Robert Burrowes, he being the first person bound to take steps, because he himself puts in a defence which in the way in which he states it puts himself out of Court, because he is the hand to pay and he is the hand to receive. It is because he is the hand to pay and the hand to receive that the Statute of Limitations does not run. The statute never runs

when there is the same hand to pay and the same hand to receive. * 964 There must be adverse possession. There must be adverse enjoyment. There must be one person to pay and another person to receive. Therefore, when he puts his case upon that ground he actually excludes himself from all defence.

Then to prevent circuity of action what this decree does, is to give at once a direct remedy to Robert, I admit against his own estate, but to Robert as trustee of the original bonds and representative of the obligor, against Robert, who happens to have the very estate which is to that extent assets for the payment of these bonds by the settlement of 1807. He says, "I do not like to pay"; no doubt it is very disagreeable, but I can entertain no doubt whatever that according to law he is liable to pay.

Then if you look into the frame of the bill, I entirely concur that in ordinary cases you cannot file a bill so as to complicate the relation of the parties. You must put yourself in the two relations of the parties interested. But here you cannot look at these pleadings without seeing that that would have led to the circuity which I have mentioned. For Robert being the person who ought to enforce the demand to begin with, and Robert being the person who ought to pay the demand to end with, Robert tells you that there is nothing due, that the money has been lost by breach of trust, that there is nothing to be recovered. Then the defence assumes a form which I must say is almost ridiculous upon the pleadings. The decree is to inquire how much is due to Robert Burrowes as personal representative of Thomas, the surviving obligee in the bonds, upon the footing of this charge, and he, being trustee, actual, positive trustee, having a beneficial decree in his favour as trustee for the benefit of his *cestui que trusts*, he actually says: "I object to this decree altogether. This decree

gives me what I am entitled to as trustee, and what my *cestui que trusts* will take, because they are entitled to it * through

* 965

me ; but the burden falls upon me, I disclaim it altogether." The whole frame of the suit shows that you must come round to that which this decree has accomplished, at a later period at all events. Therefore I think it is quite out of the question that this House is to find fault with, or to attempt to remodel these pleadings. The real justice of the case there can be no doubt about. The money has not been forthcoming. The money is due and ought to have been paid. The parties within two years after right accrued instituted a suit to recover it ; they have gone through long litigation and incurred great expense, some part, I should say, rather vexatiously ; they ought not to have been put to that great expense. I, therefore, entirely concur in the opinion of my two noble and learned friends, that this decree ought to be affirmed, and I submit to your Lordships that it ought to be affirmed with costs.

LORD WENSLEYDALE. — My Lords, when this case was considered by your Lordships in the month of April last, my noble and learned friend, the late Lord Chancellor, and myself agreed in substance in the advice which we thought it right to give to your Lordships in every respect but one. We both thought, in conformity with the opinion of the late Lord Chancellor of Ireland, that the two bonds, the subject of this suit, were not debts of Robert Burrowes the elder within the meaning of the trusts of the term for three hundred years, created by the marriage settlement of the 3d of October, 1807. We both thought that the suit was originally improperly constituted, but that on the materials before the Court a proper decree might be made that the term of three hundred years was subsisting, and that money ought to be raised by means of it, as part of the general assets of the obligor, to pay the bond debts in question if they were not barred by the Statute of Limitations, * and as that clearly began at law * 966 to run as to the principal on the death of Robert Burrowes the elder in 1816 (with due deference to my noble and learned friend opposite), I thought that there was no satisfactory evidence, whatever the truth might be, that they were taken out of the operation of the statute by part payment.

The circumstance of warrants of attorney having been given to enter up judgment on those bonds, and the question whether or not judgment had been entered up, certainly were not considered,

and I apprehend that it would make no difference (with the same deference to my noble and learned friend opposite) because the Statute of Limitations runs equally against judgments as against bonds.

My noble and learned friend and I differed in opinion upon one point only, viz. whether the bonds were taken out of the statute altogether on the ground that they were held in trust. And that point, which is, I believe, entirely new, and which had never before been made on the part of the respondents, we thought it very proper to have argued before your Lordships by one counsel on each side. Prior to the commencement of the argument, my noble and learned friend and myself stated fully, and necessarily at some length, our reasons for the opinion we had formed, and I need not repeat those reasons on my part. My noble and learned friend the Lord Chancellor, and my noble and learned friend opposite, were present when the proposed question was about to be argued, and it was thought right that the whole case, and not that single question only, should be discussed before them and their opinion given upon it.

I have now heard the further argument, and I do not know that I have any thing to alter in, or add to, the observations I have already made upon the whole of this case. If the appellant, Robert Burrowes the younger, is entitled to the benefit of the Statute of Limitations, he has a right to avail himself of it in this suit, so far as pleading goes, because he insisted upon the statute in his answer, not only in the part which has been read by the Lord Chancellor, but also in another part at the end of his answer. It seems to me, I own, that, as being entitled to an interest in the estate charged with the term of three hundred years, he has a right to set up the statute and to say that the person who attempts to have the money raised out of the estate is barred by the Statute of Limitations. And thus the only remaining question is that which I have stated.

I cannot bring myself to concur with the opinion that the circumstance of the bond having been given in pursuance of the marriage settlement of the 31st of March, 1806, creates a liability on the part of the obligor to pay the amount secured thereby, on the ground of trust, so as to prevent him having a right to insist upon the Statute of Limitations.

To go by steps; supposing a bond to have been given altogether

unconnected with any marriage settlement or trust, and afterwards to have been assigned by the obligor to some trustee upon certain trusts, and notice to have been given by the assignee to the obligor of the assignment, and of the trusts of it, I take it to be clear that no suit could be maintained upon the bond after twenty years from the period of payment, unless the case was taken out of the statute by one of the modes pointed out by it. There would be no trust created as between the obligor and the *cestui que trusts*. The obligor would not have to see to the payment of their shares to the *cestui que trusts*. Payment to the obligee would be his discharge, although the obligor might render himself liable for the breach of trust of the trustee, if he took a release from him without any payment, or paid the debt in such a way to him that the *cestui que trusts* could * never have the benefit of it. But the simple * 968 omission of the obligor to pay, and of the trustee to cause the bond to be sued upon, within the statutory time, could never amount to a breach of trust.

Suppose then that the bond had been originally given to a trustee in a marriage settlement, to which the obligor was no party, but that he had, on the creation of the bond, knowledge of the trust of the settlement, would the case be different? The money when recovered or received in the bond would be held by the obligee in trust, but is never held by the obligor. All his obligation is to pay the sum secured to the trustees, not to hold it himself in trust for any one; and the nonpayment of the money and the omission of the trustee to sue for it for twenty years, would not be a breach of trust in which the obligor concurred, and therefore in respect of which he would be still liable, any more in the second supposed case than in the first.

If then this bond is to be exempted from the operation of the Statute of Limitations on the ground of trust, it must be by reason of the terms of the marriage settlement of the 31st of March, 1806. That settlement recited that Robert Burrowes had agreed to give 2000*l.* with his daughter, as a marriage portion, to be secured and applied in the manner after mentioned, that is, 500*l.* to be paid to Mr. Gore immediately after his marriage, for his own use, and the 1500*l.* to be secured by the two bonds in question; and these bonds and all judgments thereon are declared to be on the several trusts expressed concerning the same. I must say that this provision does not, in my opinion, carry the case any further. The obligor,

Robert Burrowes, held nothing in trust. He is as he would be in the other supposed cases, a debtor merely. It seems to me, with great respect to my noble and learned friend, somewhat overstrained to say that the appellant can be treated by virtue
 * 969 * of the recital of the settlement as if he had already paid himself the whole 2000*l.* in cash, and had it in his hands, and the bond was a payment of money in his hands. Even in that case, if he had paid the money in the mode there stipulated for, I do not see how he could be considered as being a trustee for any sum.

The recital in the deed is, in my opinion, nothing but the statement of the amount of the portion and mode of payment. My opinion is probably incorrect, as I find it disagrees with that of two of my noble and learned friends, though I believe it agrees, in substance, with that of my noble and learned friend opposite, so far as regards the question of a trust being created by the terms of the bond. But I feel some satisfaction in the result of this case, because I really think, that if it were fully investigated, it would turn out that there had been part payment of the interest, though no clear and satisfactory evidence was given of that in the course of the proceedings below. I think that the bonds must have been kept alive by the payment of interest, and therefore I do not myself regret the ultimate result of this suit, namely, the affirmance of the judgment below. It is for my noble and learned friends to decide with regard to the costs, but I myself should think that, considering the difference of opinion among your Lordships, and the great difficulty that there has been in this case, the justice of the case would be best answered by affirming the decree, but without costs.

LORD ST. LEONARDS. — My Lords, when I proposed that the decree should be affirmed, with costs, I was not aware that my noble and learned friend opposite entertained so strong an opinion to the contrary of that taken by my noble and learned friends and myself.

I need not say that I feel great deference for his opinion. I
 * 970 have so much * respect for the opinion of my noble and learned friend that I think it justifies the appeal being brought here, and, therefore, I withdraw the proposition I made, and would recommend that the decree be affirmed without costs.

Decrees appealed from affirmed.

Lords' Journals, 11 June, 1858.

[740]

M'MAHON v. LENNARD.

1858. June 28, 29, 30; July 6, 16.

JOHN M'MAHON, *Plaintiff in error.*
 SIR THOMAS BARRETT LENNARD, Bart., and } *Defendants in error.*
 others, }

*Weighmaster. Office Freehold or not. Evidence. Roman Cath-
 olic. Oath. Pleading. Misjoinder of Counts. Venue.*

The office of weighmaster in a market town in Ireland is a freehold office. The appointment to it ought to be for life.

It is not necessary, in an action by the weighmaster for disturbance in his office, to show a formal appointment to it by deed. His having acted in the office for several years is sufficient.

The office of weighmaster, mentioned in the Act 4 Anne, c. 14 (Ir.), is not the same as that of weigher, mentioned in the Acts of 1 Hen. 4, c. 13, and 4 Hen. 4, c. 20 (introduced into Ireland by the 10 Hen. 7, c. 22). The Statute of Anne refers only to a weighmaster appointed to regulate the dealings between individuals in an open market; the Statutes of Hen. 4, apply to weighers of goods appointed to take customs thereon for the Crown, and therefore the provisions of the Statutes of Hen. 4, that such office should not be for life, but only for pleasure, did not apply to the weighmaster under the Statute of Anne.

By the Statute of Anne, the person appointed to such office was required to take certain oaths provided by the Statute 3 Wm. & M. c. 2. These could not be taken by a Roman Catholic. This office is taken to be included in "all offices and franchises" mentioned 10 Geo. 4, c. 7, § 21, and therefore the oath prescribed by that statute is to be taken in substitution for the oaths prescribed by the earlier statutes. But this oath must be taken in reference to the appointment to the office, and the having taken it as a barrister previous to such appointment does not relieve the appointee * from the necessity of * 971 proving that he took it upon entering his office.

A declaration for disturbance in an office contained three counts. The first and third were in case; the second, after reciting the title of the plaintiff to the office, alleged that the defendants broke and entered his dwelling-house, and seized and took the beams and scales, &c., and otherwise hindered him from exercising his said office: *Held*, that this was not a misjoinder.

The plaintiff claimed to have been appointed to his office for life. For the purpose of proving disturbance in the office, he gave in evidence certain letters of the defendant, and a notice. In these letters and notice the office was described as being held only during pleasure: *Held*, that though not proof of the truth of the statements contained in them, they were admissible evidence of the fact that such statements were made, and were properly left to the consideration of the jury on the question as to what had, in fact, been the nature of the appointment.

THIS was a writ of error upon a judgment of the Court of Exchequer Chamber in Ireland, reversing the judgment of the Court of Common Pleas there.

The action was brought by the plaintiff in error against the defendants in error, to recover damages for disturbing him in his office of weighmaster of the market town of Clones. The venue was laid in Dublin. The declaration contained three counts. The first count stated,—That whereas the plaintiff held the office of weighmaster of the market town of Clones, in the county of Monaghan, pursuant to the 4 Anne, c. 14,¹ yet the defendant,

¹ The following are the sections referred to in the course of the argument: 4 Anne, c. 14 (Ir.), is entitled, “An Act for regulating the weights to be used in this kingdom, and that salt and meal shall be sold by weight”; and enacts, in its first section, that there shall be one weight throughout the kingdom.

Section 2 enacts, that standard weights at the Queen's charge shall be made, marked, and lodged in the Exchequer, and that in every county, at the charge thereof, a set of just weights, equal to the above, and sealed with the same seal, shall remain in the towns mentioned in the Act in the custody of the chief magistrate of such towns, at the standard of all weights in such counties.

Section 3. “That before the 1st day of November, 1705, there shall be appointed in every city, borough, and market town within this kingdom, by the chief magistrate of the same, except in places where the toll and customs belong to any other person, and in such case by the person or persons to whom the toll and customs of such city, borough, or market town doth belong, one honest, discreet person, who shall be weighmaster in the said borough or market town, who shall be sworn justly, truly, or indifferently to weigh all goods, wares, and merchandise as shall be brought unto him, between buyer and seller.”

Section 4. “That a proper beam, scales, and weights shall be provided at the charge of each city, borough or market town, or by the person or persons to whom the toll and customs of the same do belong as above, and shall remain under the care and custody of the weighmaster appointed.”

Section 5. That any chief magistrate or person who receives the toll and customs, neglecting to appoint and swear in a weighmaster, as above, or to provide beams, scales, and weights, properly sized and sealed, shall be fined 40s. per month for the time he shall make default in all or any of the above particulars.

Section 9. “Provided always, that no person or persons whatsoever shall act as weighmaster, or at any time execute the said office, before he doth take the oaths and subscribe the declaration mentioned in the Act of Parliament made in England (3 Wm. & M. c. 2), ‘An Act for abrogating the oath of supremacy in Ireland, and appointing other oaths, which oaths the respective magistrates of every city, borough, or market town in this kingdom, or where there is no magistrate, the next justice of the peace, is hereby authorised to administer.’”

There were other statutes relating to the same matter; the 25 Geo. 2, c. 15 (Ir.), § 10, after stating that great abuses had arisen in consequence of other persons than the weighmasters appointed under 4 Anne, c. 14, erecting scales, and

* intending to disturb him in the exercise of his said office, * 972
and to deprive him of the fees, &c. did weigh in certain
scales of the defendants, in the said market town of Clones,
* divers wares, goods, &c., and did take divers fees, &c. for * 973
the weighing of said wares.

The second count stated the same inducement, and alleged that the plaintiff was weighmaster of the market town of Clones, in the county of Monaghan, pursuant to, &c. a certain Act of Parliament of the 4 Anne, entitled "An Act for regulating the weights used in this kingdom, and that salt and meal shall be sold by weight"; and as such was entitled to the fees and emoluments appertaining to said office, and had and received the same, and was duly provided with iron beams, scales, and weights, &c. at Clones aforesaid, and which same beams, &c. were properly set up in a certain house of the plaintiff, called the market house, situate in the market place, within the market town of Clones, and in which market house, &c. the plaintiff, during, &c. had exercised his office, and the fees, &c. had received. Yet the defendants. intending, &c. to disturb him in the exercise of his said office, and to deprive him of the fees, &c., and whilst the plaintiff was such weighmaster as aforesaid, broke and entered said market house, and then and there ejected him from the possession, &c., and seized and took the beams, &c., and carried away the same, and converted and disposed thereof to their own use; and thereby and otherwise hindered and disturbed the plaintiff in his said office, and prevented him from receiving the fees belonging to the said office.

The third count, beginning with the same inducement, stated that the plaintiff, as such weighmaster, was entitled to the fees, &c. appertaining to said office, and had received the same, yet the defendants, intending to injure him and to disturb him in the exercise of his office and to deprive him of the fees, &c., injuriously and unlawfully hindered and disturbed the plaintiff in and from exercising his said office * within said market town, * 974
and prevented him, from receiving the fees, &c. to the
damage of the plaintiff of 2000*l*.

weighing goods for hire, enacts penalties for such an offence, which penalties are recoverable before the Lord Mayor of Dublin, and the seneschals and chief magistrates of the towns in which the offence shall be committed.

The 27 Geo. 3, c. 41 (Ir.), recites this provision, and extends it to market towns not corporate, making the penalties recoverable before justices of the peace for the county.

The defendants pleaded the general issue.¹

The cause was tried on the 21st day of June, 1852, before Chief Justice Monahan, and a verdict was found for the plaintiff, with 200*l.* damages, subject to a bill of exceptions hereinafter mentioned.

The following letters addressed to the plaintiff were given in evidence for him:—

“ DUBLIN, August 29, 1847.

“ DEAR SIR,— I send you, as weighmaster, the note of the resolutions of the Court Leet of the manor of St. Tierney, with my request, that you will carefully comply with the orders of the Court and endeavour to carry out their desire, as I, in my department, as seneschal, will endeavour to do.

“ I am, sir, your obedient servant,

“ NICHOLAS ELLIS.

“ To J. M'MAHON, Esq., Clones.”

The resolutions which accompanied this letter are not material. The next letter was in these terms:—

“ ENNISCORTHY, September 3, 1847.

“ DEAR SIR,— The places intended for the beams are the spaces between the pillars and back wall; but when you have the beams and scales ready I have no doubt that Mr. Felson will come over from Belturbet and fix them up for you. When you shall be ready for him, Lennard will write to Felson and get him over.

“ I am yours, dear sir,

“ NICHOLAS ELLIS.”

* 975 * These two letters were produced by the plaintiff for the purpose of showing a complete acknowledgment of him as weighmaster. Then came the notice of removal, which was produced to prove disturbance of him in his office:—

“ I hereby require you to deliver up to me, on behalf of Sir Thomas B. Lennard, Bart., on the 1st day of May next, all that the place and office of craner and weighmaster of Clones, in the manor of St. Tierney, in the parish of Clones, in the barony of

¹ At the period of these pleadings this plea put in issue all the allegations in the declaration.

Dartrey, and county of Monaghan, with all and singular the appurtenances which you hold from the said Sir Thomas B. Lennard, Bart., as tenant from year to year. Dated this 29th day of October, 1849. Nicholas Ellis, agent of the said Sir Thomas Barrett Lennard.

“ To John M'Mahon, Esq., and all others concerned.

The next letter, also from Mr. Ellis to Mr. M'Mahon, was dated 17th August, 1850, and stated the reason for the plaintiff's removal from office. It said: “ You may see by advertisements and proceedings on all sides that steps are in progress that will be ruinous to the markets of Clones. It is evident that the conduct of the cranes as at present administered does not give satisfaction, and that if an appointment be not regularly made at a Court leet the markets will be dispersed. To prevent such depression and ruin of the markets of Clones, it is indispensable that the weighmaster should attend at the cranes every market day, and should, even during the intervening days, exert himself diligently to improve the markets. It is impossible a barrister, residing for the most part of his time in Dublin, could discharge those duties which are not only incompatible with, but beneath the dignity of his profession. Under these circumstances, I am sure you must see the necessity of the steps I have taken towards the appointment of a person to * the office of weighmaster who * 976 could devote all his time to it, and I am now willing to purchase from you, at first cost, the scales and weights which you have set up in the market house and yard.”

Then followed a public notice signed by Sir T. B. Lennard, in which the plaintiff's removal from the office was notified. It began by reciting, that “ Whereas John M'Mahon, Esq., of Clones, in the county of Monaghan, has for some time past been permitted by me to hold the office of weighmaster of Clones, which office or situation he held liable to have same determined at my will and pleasure, and by virtue of my said permission, without any further or other appointment whatsoever ” ; and then declared that he was removed from this office and was not entitled to receive fees, and ceased to be connected therewith, “ as if he had never been permitted to hold the same.”

The next paper was the appointment by Sir T. B. Lennard of Mr. Henry Whiteside, of Cappa, gent., to be weighmaster. Then

followed written authorities from Sir T. B. Lennard to Mr. N. Ellis and Mr. Whiteside, to take possession of the market house. Other evidence was then given. A judgment obtained in 1851 by the plaintiff against Nicholas Ellis and Whiteside, for trespass in ejecting him from the market house in Clones, was put in. Receipts for rent due from Hugh M'Mahon (the plaintiff's father and his predecessor in the office), and afterwards from the plaintiff, to Sir T. B. Lennard, in respect of "four holdings at Clones in the manor of Tierney and county of Monaghan," and also receipts for poor's rates paid by the plaintiff, were produced.

On the part of the defendants, Mr. Nicholas Ellis proved that he had been Sir T. Lennard's agent for many years. Hugh M'Mahon personally attended the markets. While Hugh M'Mahon * 977 lived, the market house was nearly built * anew; during that time the markets were held in Sir T. Lennard's farm-yard; this was done without leave being asked of Hugh M'Mahon; he died in 1845, and the plaintiff, his only son, continued to do the duties and to pay the rent. Witness never knew, till the trial of *M'Mahon v. Ellis and Whiteside*, that the plaintiff had been rated as occupier of the market house; afterwards complained of this, and the ratebooks were altered. Evidence was given to show that, from the want of personal attendance on the part of the weighmaster, the business of the market had been injured.

On the demand of the defendants' counsel, the counsel for the plaintiff admitted that the plaintiff was a Roman Catholic; whereupon the defendants objected that, as such, he was bound to prove that he had taken the oaths prescribed by the 10 Geo. 4, c. 7, prior to and in respect of his acting as such weighmaster; the plaintiff's counsel insisted, that in order to sustain the present action, it did not lie on him to prove that he had taken the oath; and he asked for an admission by the defendants' counsel that he in the Michaelmas Term of 1841, prior to his beginning to act as weighmaster, had been admitted a barrister at law, he being then a Roman Catholic, and had then taken the oaths prescribed by 10 Geo. 4, c. 7. These facts were admitted by the defendants' counsel.

The defendants also put in evidence a letter, of which the important parts were the following:—

" 40 BRYANSTON SQUARE, LONDON,

" February 11, 1846.

" DEAR SIR, — Since my arrival here I have been called upon to account for the crane of Clones, as to the person filling the office since your father's death, and the rent now paid for it. Upon the first point, I have answered, that you went on in the office from the death of your father, * without any * 978 communication with me upon the subject; but that my only object being to have the office satisfactorily filled, I had made no alteration. At the same time I had not been without my fears that your higher avocations would render your personal attendance on the market inconvenient to you; but of this matter I consider that you may be the best judge. It is my wish to do what may be most advantageous to your father's son. Then, as to the rent, I cannot give any perfect answer at present. A fair investigation of the account is not only reasonable, but is required of me; and my advice is, that the matter shall remain quietly between you and me without letting the question be canvassed in the Diamond. I make you the alternative proposal: go into the account with me and settle the rent accordingly, or take it, for the present, at a rent of 100*l.* a year, from May, 1844, the date of my last settlement of accounts with Sir Thomas Lennard.

" Yours very truly,

" NICHOLAS ELLIS.

" To JOHN M'MAHON, ESQ., Clones, Ireland."

The evidence on both sides being closed, the Chief Justice proceeded to charge the jury. He said that the questions to be determined were, whether plaintiff had been duly appointed to the office of weighmaster by Sir Thomas Lennard, and, if so, had he taken the oath of office prescribed by the third section of the 4 Anne, c. 14; and if both these issues were found in the affirmative, and also that the plaintiff had been disturbed in the office by the defendants, the verdict must be for the plaintiff. He ruled that the appointment need not be by deed, but might be by parol. That an appointment to this office, to be valid, should be for life; and, therefore, if on the whole of the evidence it appeared that an appointment had been made, still if such appointment was made during the will and * pleasure of Sir Thomas Len- * 979 nard, or from year to year, as had been stated in some of

the documentary evidence, in either such case the appointment would be void, and in such case the verdict must be for the defendants; but if the appointment was made expressly for life, or generally without limiting any duration as to time, the same would, in his opinion, in point of law, amount to an appointment for life; that then the question to be determined would be whether the plaintiff had been sworn to discharge the duty of the office as required by the Statute of Anne; that this last question was to be considered with reference to the fact that it was raised between the weighmaster and the appointee, whom he had the power to appoint, but was also, under the 5th section of 4 Anne, c. 14, bound to swear in. If, though regularly appointed, he had not been sworn into the office, the verdict must be for the defendants. And the Chief Justice also told the jury, that, in his opinion, no misconduct or neglect of the plaintiff in the discharge of his duty as weighmaster, or his performing the duties of the office by deputy would authorise the defendant of his own mere motion or authority, without notice, to dismiss the plaintiff from his office of weighmaster; but that such dismissal must be the result of proceedings legally and with notice instituted.

The defendants' counsel had required the Chief Justice to nonsuit the plaintiff, which his Lordship refused to do, and the following exceptions to the Chief Justice's refusal to nonsuit, and likewise to his direction, were taken on behalf of the defendants:—

First. That the Chief Justice ought to direct the jury to find a verdict for the defendants, it not appearing by the evidence that the alleged appointment of the plaintiff to the office, in the pleadings mentioned, was by deed.

* 980 * Second. That he ought to direct the jury that there was no evidence of any appointment of the plaintiff to the said office, or that such appointment was only made during the will and pleasure of Sir T. B. Lennard, and that, therefore, the verdict must be for the defendants.

Third. That he ought to direct the jury that there was no evidence that the plaintiff had taken the oaths required by the Statutes 4 Anne, c. 14, and 27 Geo. 3. c. 41.

Fourth. That he ought to direct the jury to find a verdict for the defendants on the ground that the venue was improperly laid in the county of the city of Dublin, whereas, it ought, on the

evidence, to have been laid in the county of Monaghan, where the plaintiff acted as such weighmaster, and where the alleged obstructions of the plaintiff as such weighmaster occurred.

Fifth. That he ought to direct the jurors to find a verdict for the defendants if they believed upon the evidence for the plaintiff that the duties of the office of weighmaster had been discharged by the plaintiff by deputy.

Sixth. That he ought to direct the jury to find a verdict for the defendants, because the action of the said plaintiff did not lie for the obstructions in the declaration mentioned; but that the said plaintiff should have adopted another mode of remedy; viz. by action on the case for penalties, as given and pointed out by the Statutes 4 Anne, c. 14, and 27 Geo. 3, c. 41, continuing the aforesaid statute.

Seventh. That evidence produced to prove that the duties of weighmaster, in consequence of the plaintiff not being personally present to discharge them, were not properly performed, had been improperly rejected, on the ground that there was no proof that this matter had been made the subject of notice and investigation.

Eighth. That the plaintiff had not duly taken the oath
* required by statute before entering on the discharge of * 981
his duties as weighmaster.

Ninth. That the Judge ought to tell the jury that there was no evidence of a complete or sufficient appointment of the plaintiff to the office, or of his having taken the necessary oaths, or that he ought to tell the jury, that if the jury believed the evidence, it negatived any such sufficient and complete appointment.

Tenth. That the Chief Justice ought to tell the jury that the plaintiff had not established his title to the said office, as he had not shown any deed appointing him to the office, and had not given evidence to show that he had taken all the necessary oaths required by the Statutes of 4 Anne, c. 14, and 27 Geo. 3, c. 41, and 10 Geo. 4, c. 7, prior to and in respect of his acting as such weighmaster as aforesaid.

Eleventh. That the Judge had told the jury that, in his opinion, no misconduct or neglect of the plaintiff in discharge of his duty as weighmaster, or his performing the duty by deputy, would authorise the defendant, Sir T. Lennard, of his own mere motion and authority, without any notice to the plaintiff, to dismiss him from the said office of weighmaster, but that for that purpose

some legal proceedings, with notice to the plaintiff, should be resorted to; and the defendants insisted that the Chief Justice ought to tell the jury, that in case of gross misconduct by the weighmaster in his said office, Sir Thomas Barrett Lennard had power by law to remove him from the office; and if such misconduct was now proved to have existed, the verdict must be for the defendants.

Twelfth. That the Chief Justice ought to tell the jury that there was no evidence of an appointment, if any, by Sir T. Lennard, to the said office, except of an appointment during the pleasure *982 of said Sir Thomas Lennard, or * from year to year, and ought therefore to direct a verdict for the defendants.

Thirteenth. That the Chief Justice had left it to the jury to say whether or not Sir T. B. Lennard had done his duty by swearing in the plaintiff to the said office; whereas, he ought to tell the jury that there was no evidence to show that he had been sworn in.

The fourteenth exception was, that the Chief Justice ought, on the whole of the evidence, to have directed a verdict for the defendants.

The jury found a verdict for the plaintiff, with 200*l.* damages.

The exceptions were argued in the Court of Common Pleas in Michaelmas Term, 1852; and in Easter Term, 1853, the Court unanimously gave judgment for the plaintiff, overruling all the exceptions. On a writ of error to the Exchequer Chamber, the errors assigned were the same as the exceptions taken at the trial, and further, that there was a misjoinder of counts in the declaration, for that the first and third counts were in case, and the second count in trespass.

The case was argued in the Court of Exchequer Chamber, and the Judges there overruled all the exceptions and causes of error assigned, except so far as related to the ninth and twelfth exceptions; a majority of the Court held that these exceptions ought to be allowed, and the judgment of the Court of Common Pleas was therefore reversed, and a *venire de novo* awarded. The present writ of error was then brought.¹

¹ The Judges were summoned, and Lord Chief Justice Cockburn, Mr. Justice Wightman, Mr. Justice Erle, Mr. Justice Williams, Mr. Baron Martin, Mr. Justice Crompton, Mr. Justice Willes, Mr. Baron Watson, and Mr. Justice Byles attended. Lord Chief Justice Cockburn ultimately gave no opinion.

* *Mr. Fitzgerald* and *Mr. Bovill* for the plaintiff in error.— * 983
 The office held by the plaintiff was, in its nature, freehold ; it is one held under the provisions of the 4 Anne, c. 14 (Ir.), and though the statute does not expressly define its nature, yet where an appointment of this nature is for an intermediate term, the law presumes it to be for life, Bacon's Abridgment, Office H., and Co. Lit. 42 a., and *Stephenson v. Stephens*,¹ where a construction to that effect was expressly put on this statute. *Veale v. Priour*² was relied on in the Court below, to show that where a greater estate might be given a lesser might be created ; and that no doubt is so, but it is subject to the exception there stated, namely, unless there are special reasons to the contrary. Here those reasons exist in the words of the statute. And on that ground *Jones v. Clerk*,³ which was a grant for years of the office of Garbler of Spices, under the 21 Jac. 1, and *Smyth v. Latham*,⁴ which was the grant of the office of Paymaster of Exchequer Bills, do not affect this case. In *Harcourt v. Fox*⁵ the question was whether the appointment to the office of Clerk of the Peace, always deemed a freehold office, was for the life of the appointer or the appointee, and it was held to be the latter ; and being a freehold office, the holder of it cannot be removed but after notice and inquiry, *Bagg's Case*,⁶ *The King v. Gaskin*,⁷ *The Queen v. Smith*.⁸ In the Court below, *Vaux v. Jefferson*⁹ and *The Earl of Shrewsbury's Case*¹⁰ were relied on for the other side, but they do not justify the proceeding here, for, in the former, the only question really * decided was, that * 984 where the discharge was of an officer of the Court, and was made by all the Judges in open Court, there need not be an entry of it on record ; and in the latter the decision was, that where an officer is bound, on request, to execute his office, if he do it not on request, it is a forfeiture, and nothing was determined as to calling on the officer to answer the charge.

The third and fourth sections of 52 Geo. 3, c. 134, are important to be considered here, as indicating the spirit of the law in Ireland on these matters. That is one of the Butter Acts, and those sections show that the weighmaster himself can only be displaced for

¹ 11 Irish, Law, 10.

² Hardr. 351.

³ Hardr. 46.

⁴ 9 Bing. 692.

⁵ 1 Show. 426, 506, 516.

⁶ 11 Rep. 99 a.

⁷ 8 T. R. 209.

⁸ 5 Q. B. 614.

⁹ 2 Dyer, 114 b.

¹⁰ 9 Rep. 50 b.

proved misconduct, and that it was considered necessary to give him, by special enactment, the power to remove at will his deputy.

Then it is contended that the letters called for by the plaintiff to prove the disturbance are to be taken as proof that the appointment was during pleasure only. But the answer to that argument is, first, that the letters were put in for a particular purpose by the plaintiff, and cannot be applied to a different purpose by the defendant; and next, that the statements made in them do not prove themselves. At the utmost, they can only show that they were made by the writer of the letters.

The office being a public office, if a man is found acting in it for a considerable time, the presumption arises that he was rightly appointed, *Berryman v. Wise*,¹ which was followed by *The King v. Verelst*,² *Butler v. Ford*,³ *M'Gahey v. Alston*,⁴ *Cannell v.*

Curtis,⁵ *Marshall v. Lamb*,⁶ *The Queen v. Grimshaw*,⁷ *Doe* * 985 *d. Bowley v. Barnes*,⁸ *Wolton v. Gavin*,⁹ * *The Queen v. Ossett*,¹⁰ and *Scadding v. Lorant*.¹¹ And *Rodwell v. Redge*,¹² and *The King v. Hawkins*,¹³ besides establishing the same rule, also show that, under such circumstances, the taking of the sacrament may be presumed. Here there was ample evidence that the plaintiff had acted in the discharge of the duties of his office.

But then it was contended that, even if properly appointed to the office, there was no evidence that he had taken the oaths required by the statute to be taken before entering on the discharge of the duties. The fifth section of the Statute of Anne provides that no person shall act as weighmaster before he has taken the oaths required by the Statute 3 Wm. & M. c. 2; and the 25 Geo. 2 (Ir.), and the 27 Geo. 3, make further provisions on the subject. But all these statutes are now, so far as concerns the oath, superseded by the 10 Geo. 4, c. 7. That statute does not require the oaths to be taken in respect of all appointments, but only in respect of offices in the gift of the Crown or of a corporation. This is not a corporate office nor a place in the gift of a corporation. In these two respects it is, therefore, not within the Statute

¹ 4 T. R. 366.

² 3 Camp. 432.

³ 1 Crompt. & M. 662.

⁴ 2 M. & W. 206.

⁵ 2 Bing. N. C. 228.

⁶ 5 Q. B. 115.

⁷ 10 Q. B. 747.

⁸ 8 Q. B. 1037.

⁹ 16 Q. B. 48.

¹⁰ 16 Q. B. 975.

¹¹ 3 H. L. Cas. 418.

¹² 1 Car. & P. 220.

¹³ 10 East, 211.

of Anne, so as to require the taking of the oath. Nor is it a place of trust under the Crown, nor does it come under the words of the 21st section of the 10 Geo. 4, c. 7, "any other office or franchise," for those words must be construed with reference to the words which immediately precede them, and which are, "place of profit under his Majesty."

[LORD WENSLEYDALE. — By that argument you are constructively introducing the word "such" into the clause.]

And that may be done here, for the section goes on,
 * "at the times and in the manner aforesaid," and so com- * 986
 bines all the offices mentioned in the statute, and thus impliedly excludes all which are not mentioned.

But here the oath was constructively taken. The defendant called for the admission that the plaintiff was a Roman Catholic. That might not mean that he had been so at the time of his appointment, and the onus of making out this objection, which is in the nature of a penal exclusion, lies on the person who put it forward; *Powell v. Milburn*.¹ The same rule of law which, from the fact of his acting in the office, raised the presumption that he had been properly appointed to it, will raise the other presumption that he has done all the acts which the law requires upon entering on the duties of the appointment. An objection of this kind ought to have been taken as a ground for a new trial, and not as an exception; and in truth the remark of the Lord Chief Justice, that the plaintiff had already taken the oaths as a barrister, was a bad reason for his ruling that the plaintiff was not required to take the oaths as weighmaster, but was not the ruling itself. Here, therefore, the bill of exceptions does not state a misdirection, but only the Judge's reasons, or a non-direction; that is insufficient, *Anderson v. Fitzgerald*.² Another Court cannot look beyond the bill of exceptions; *Bain v. The Whitehaven Railway*.³ There was proof that the plaintiff here had, as a barrister, taken the same oaths as those to be taken by the officer; he was not required to repeat them on being appointed to this office; but even if so, then he was saved by the Annual Indemnity Act, 8 & 9 Vict. c. 24. That Act was certainly passed on the 30th June, 1845, and he entered on his office in August following; * but such Acts * 987
 are both prospective and retrospective; *In re Steavenson*.⁴

¹ 3 Wils. 355, s. c. nom. *Powell v. Milbank*, 2 W. Bl. 851.

² 4 H. L. Cas. 484.

³ 3 H. L. Cas. 1.

⁴ 2 B. & C. 34.

Then it was contended below that the plaintiff had wrongly laid the venue in Dublin, whereas the venue ought to have been local. If that objection is a valid one, it existed on the record, and should have been taken advantage of on demurrer; it is too late after verdict, *Litchfield v. Slater*; ¹ *Boyes v. Hewetson*.² But in law an action of this sort is transitory, *Wms. Saunders*,³ where all the authorities are collected.

Then as to the alleged misjoinder of counts. The dictum of Mr. Baron Parke in *Weeton v. Woodcock* ⁴ was relied on, but that dictum was entirely misapprehended as applied to this case. It was this: "Upon this declaration the plaintiff might have recovered for the trespass, and consequently, such cause of action cannot be joined with case." Here the plaintiff could not have recovered complete damages on one count only; and *Wells v. Ody* ⁵ shows that though the facts would have warranted an action of trespass, case is also maintainable where the remedy would be incomplete without it.

The Attorney-General (Sir F. Kelly) and *Mr. Hercules Ellis* (of the Irish bar) for the defendant in error. — This is not a freehold office within the Statute of Anne. It is an office relating to tolls belonging to the lord or owner of the tolls, and he may appoint to it for years or at pleasure. The letters, which are the only evidence of any appointment, show that no regular appointment of the plaintiff was ever made, but that he was allowed to continue * the discharge of the duties of an office of which his father had been the possessor. It may well be questioned whether, as against the patron of an office, the merely acting in discharge of its duties can be treated as an appointment; for if so, that might be in direct contravention of the principle that a man shall never derive profit from his own wrongful acts. But it is not necessary here to consider that question. It may be admitted that *The King v. Verelst* ⁶ shows that acting in an office is *prima facie* proof of appointment to it, but it also shows that it is only *prima facie* proof, and may be rebutted. Assuming the acting in the office to be *prima facie* evidence of presumption of an appointment, there are sufficient facts here to rebut the presumption

¹ Willes, 431.

² 2 Bing. N. C. 575.

³ Vol. 1, p. 240, 246 b.

⁴ 5 M. & W. 587, 594.

⁵ 1 M. & W. 452.

⁶ 3 Camp. 432.

arising therefrom. Indeed the letters put in by the plaintiff himself distinctly prove that he was treated by the defendant merely as a person holding the office at the will and pleasure of the defendant.

There was no direct proof of any appointment; the plaintiff acted in the office; of that the evidence was complete, and undisputed. One of the letters was addressed to him as so acting, but the others showed that his office was not for life, but at the will of the patron. There was no question for the jury, the only question was for the Judge, and the Judge ought to have directed a verdict for the defendant. That principle was adopted under similar circumstances in *Smith v. Cartwright*,¹ where the acting in an office under a corporation was held to require proof of an appointment under seal. The burden of proving a regular appointment lies on him who claims the benefit of it. Here there was either no evidence at all, or the evidence was equal both ways. Though the letters called for by the plaintiff to prove disturbance * in the office were not absolutely proof of the truth of * 989 the statements contained in them, yet till he showed that those statements were untrue, he was bound by them, *Fletcher v. Froggatt*.² *Randle v. Blackburn*³ is still stronger authority for that proposition. There are other cases to the same effect collected in Phillips on Evidence.⁴

[LORD WENSLEYDALE. — Would not that go to this length, that if I gave a written direction to a man to take up another for that he had stolen my watch, the proof, by the man taken up, of my direction, would be evidence of the fact of his stealing?]

Not in that case; but if a tenant gives in evidence a notice to quit, which notice contains the terms of the tenancy, that notice would be proof of those terms.

[LORD WENSLEYDALE referred to *White v. Morris*,⁵ *Glave v. Wentworth*,⁶ and *Haylock v. Sparke*,⁷ intimating, however, his preference for the decision in the first of these cases.]

It is a mistake to say, that this is an office within the Statute of Anne. That statute gives to the mayors of towns corporate the right to appoint to certain offices. Clones is not a town of the kind described in the Act. Then the owner of the tolls is not a

¹ 6 Exch. 927.

² 2 Car. & P. 569.

³ 5 Taunt. 245.

⁴ 9th ed. vol. 1, p. 344.

⁵ 21 Law J., N. S., C. P. 185.

⁶ 6 Q. B. 173, n.

⁷ 1 Ellis & B. 471.

person who can be brought within enactments intended for the Crown, or for mayors of corporations.

But supposing the office to be within the Statute of Anne, there is nothing in that statute to show that it is an office for life. That statute is silent on the point. The law previous to that * 990 statute must, therefore, be looked at. * Under the Statutes of 14 Rich. 2, c. 10, 17 Rich. 2, c. 5,¹ 4 Hen. 4, c. 20, and 8 Hen. 6, c. 5, all of which were made law in Ireland by 10 Hen. 7, c. 22, provisions are made, all of which are strong to show that the office was to be held during pleasure only. That was the practice of ancient times. Till the reign of William 3, the Judges themselves held office only during pleasure. There is one thing in the Statute of Anne which strongly favours the argument that the office could only be held during pleasure. The office of weighmaster of a corporation can only be appointed by the chief magistrate of a town, who, it is well-known, holds his own office only for a year.

[THE LORD CHANCELLOR. — You have at this moment an example before your eyes of one whose tenure of office is precarious, but who yet makes many appointments for life. LORD BROUGHAM. — And persons who hold *per auter vie* may grant for the life of the appointee; for example, the Regent.]

Then as to the taking oaths. Having taken them as a barrister will not satisfy the requirements of the Statute of Anne; they must be taken on appointment to the office of weighmaster, and the burden of proving the performance of the statutory duty lies on the officer or person who ought to perform it. The officer must tender himself to take the oaths of office, and must take them at his peril, *The King v. The Mayor of Oxford*,² *Anonymous*.³

* 991 * The 21st section of the 10 Geo. 4, c. 7, directly applies to this case, for however appointed or whatever its duration, this is “an office or franchise.”

Then again it is clear that this is an office the duties of which must be discharged in person, and not by deputy. The statute

¹ The 14 Rich. 2, c. 10, which seems to have been a model for the other statutes, was in these terms: “That no Customer, Controller, Searcher, or Tronour have any such office for term of life, but only so long as shall please the King, notwithstanding any patent or grant made to any to the contrary. And if any such patent or grant be hereafter made to any such office, the King willeth that be utterly repealed and void, and of no force nor value henceforward.”

² Salk. 428.

³ Freem. 475.

requires the oaths to be taken by the weighmaster, and makes no mention of a deputy. In the case of a weighmaster of a corporation, the chief magistrate has no power to appoint a deputy, and has no control over him, so that if a deputy was appointed and misconducted himself, no proceedings could be taken against him, which circumstances show that the law never contemplated the appointment of a deputy, or intended that the office should be exercised by any one but the principal officer in person.

Then as to misjoinder of counts. The substance of the second count is trespass; and *Hudson v. Nicholson*¹ decided that where the declaration states a wrong which is the subject of an action of trespass, it is a good count in trespass after verdict, although it contains no allegation of trespass *vi et armis*, and is in point of form framed in case for the consequential injury. That case and *Weeton v. Woodcock*,² are decisive of the present; so is *Scott v. Nelson*.³ If so, then there is a misjoinder of counts.

The venue here was local, not transitory, Comyn's Digest,⁴ Stephen on Pleading.⁵

[LORD WENSLEYDALE. — You should have demurred.]

No; for after each allegation of a particular disturbance in the county of Monaghan, there was a general allegation that "the defendant thereby and otherwise disturbed," &c., which might have been an answer to a demurrer. But the acting in the office, the use of the weighing house, and of the * scales and * 992 beams, all occurred in the county of Monaghan, and the discharge from the office, though written elsewhere, was made public there. Every issue connected with the possession of land must be local, *Bulwer's Case*.⁶ An action for a breach of the customs of a town is local, *Berwick v. Ewart*.⁷

Mr. Fitzgerald replied.

[THE LORD CHANCELLOR (LORD CHELMSFORD) put the following questions to the Judges: —

Whether the 2d, 3d, 5th, 9th, 10th, 12th, 13th, and 14th exceptions, or any of them, ought to have been allowed?

Whether there is any misjoinder in the counts of the declaration?

¹ 5 M. & W. 437.

² 5 M. & W. 587.

³ 5 Irish Law, 207.

⁴ Tit. Action. N 11, 12.

⁵ Ch. II. § 4, Rule 1.

⁶ 7 Rep. 56, 57, fol. 4 b; Dyer, 38 b.

⁷ 2 W. Bl. 1068.

Mr. JUSTICE WIGHTMAN, on behalf of the Judges, delivered the following answers to these questions : —

The parties in this case on both sides agree that the appointment to the office of weighmaster of the market town of Clones was in the defendant Lennard, as owner of the tolls, and the first question proposed by your Lordships is upon the second exception taken by the counsel for the defendants at the close of the plaintiff's case, that there was no evidence of any appointment of the plaintiff to the office of weighmaster ; or if there was, that the appointment was only made during the will and pleasure of the defendant Lennard.

The plaintiff claims the office of weighmaster as a freehold office under the Irish Statute 4 Anne, c. 14, and we are disposed to think that, as far as appears upon the case before your Lordships, * 993 it must be taken as against the * plaintiff, that it is an office under that statute, and that, according to the decisions referred to upon the argument, it is a freehold office, and if so, the appointment, whether by deed or parol, ought to be for life, but not necessarily by deed.

Was there then at the close of the plaintiff's case any evidence of such an appointment ?

It may be fit to consider what is to be understood by the expressions " any " evidence or " no " evidence to go to the jury. The reasonable rule appears to be that expressed by the Court of Exchequer Chamber in the case of *Avery v. Bowden*,¹ in accordance with the opinion of Lord Tenterden : " That if the evidence was such that the jury could conjecture only and not judge, it ought not to go to the jury ; that the onus was on the party offering the evidence, and that if he only offered evidence consistent with either supposition or fact, he was not entitled to have it put to the jury."

In the present case the plaintiff's case is, that he was appointed by the defendant Lennard to the office for life ; the defendant's case is, that the plaintiff was appointed by the defendant Lennard to hold the office at the will of Lennard, or at most from year to year.

It is for the plaintiff to give reasonable evidence that he was appointed for life. For this purpose the evidence that he brought in support of his case was, that he acted as weighmaster upon the

¹ 6 Ellis & B. 973, 974.

death of his father some time in or about the year 1847, and that on the 29th of August, 1847, he received a letter from Ellis, the defendant's agent, a letter commencing: "I send you, as weighmaster, the note of the resolutions of the Court Leet, &c."; which he contended was a recognition of his holding the office of weighmaster. * He also put in a notice to quit by Ellis, as * 994 agent to Lennard, dated 29th October, 1849, in which he requires him to quit the place and office of coroner and weighmaster which he then held from Lennard as tenant from year to year, and also a discharge from Lennard, dated the 17th of September, 1850, of the plaintiff from holding the offices, which Lennard states the plaintiff held determinable at his will and pleasure.

It was said for the plaintiff that these documents were given in evidence only for the purposes of showing disturbance in the office, and therefore that any statement in them derogatory to the title of the plaintiff as holding under an appointment for life would not be evidence against him; but it appears to us that those documents were wholly insignificant for the purpose of proving that the plaintiff was disturbed in his office, as a mere notice would not show a disturbance, and that they were in reality used to show that, by the acknowledgment of the defendant Lennard and his agent, he held the office; and he then contended that if he held it at all, it would only be for life. If the documents were used for this purpose, as we think they were, then the whole of the documents and the statements in them are evidence in the cause as well against as for the plaintiff, and tend strongly to show that there was no appointment for life, but only at will, or from year to year.

The evidence given by the plaintiff, assuming that we are right in thinking that the whole of the statements in the documents are to be taken as evidence in the case, appears to us to be much more consistent with the case of the defendant than with that of the plaintiff; and we therefore agree in opinion with those of the learned Judges in the Court of Exchequer Chamber in Ireland, who held that the second exception ought to have been allowed.

* With respect to the third exception, it appears to us * 995 that as the oaths of office are required to be taken by the weighmaster immediately, and the person appointing is to administer the oath, the acting in the office affords a presumption that

the person appointed had taken these oaths, and that the third exception ought not to be allowed.

We are also of opinion that proof of the performing the duties of the office by deputy did not entitle the defendants to a verdict, and that the fifth exception ought not to be allowed for the reasons given in the Court below.

As to the ninth exception (which was taken after the whole case and evidence on both sides were closed), that the learned Judge should have told the jury that there was no evidence of a complete or sufficient appointment of the plaintiff to the office, or of his having taken the necessary oaths, or that he should tell the jury that if they believed the evidence it negatived any such sufficient and complete appointment, it appears to us that that exception should have been allowed.

We have already given our reasons for thinking that, even upon the evidence for the plaintiff, there was no sufficient case for the jury; and when the evidence for the defendant is to be added, we think the Judge ought to have told the jury that if they believed the witnesses, they ought to find a verdict for the defendants. The evidence of Ellis, and of his communication with the plaintiff upon the subjects mentioned in his letter of the 4th February, 1846, as to the rent that was to be paid by the plaintiff, appears to us to be quite inconsistent with the appointment for life; but it is said, non-direction is not a ground of exception, though misdirection is,

and the case of *Anderson v. Fitzgerald*¹ was cited in support * 996 of this position. In * that case it was the opinion of the

Judges that it was not enough to object, by way of exception, that the Judge omitted to give the proper direction to the jury, though requested to do so, but that what he did say, by way of direction, ought to be stated. In the present case the Judge's direction to the jury is stated, and it is objected that that direction was erroneous, in not telling the jurors that which is stated in the bill of exceptions, and the exception in this case is distinguishable from that in *Anderson v. Fitzgerald* in that respect. The omission to direct the jury upon a material point, upon which the Judge is required by the counsel to give a direction, may amount to a misdirection, and may, we think, be made a ground of exception if the exception be properly framed; and as we think that the learned Judge ought to have directed the jury as requested, and that as the

¹ 4 H. L. Cas. 484.

actual direction as well as the request and refusal to direct as requested appear upon the exception, it seems to us that the ninth exception may be maintained.

The tenth exception, in addition to some points to which we have already adverted, raises the question as to the direction of the learned Judge with respect to the oath to be taken by a Roman Catholic. The objection to the learned Judge's direction is more directly taken upon this point by the eighth exception, upon which your Lordships have not requested our opinion.

By the 9th section of the Irish Statute of the 4 Anne, c. 14, no person is to act as weighmaster before he has taken the oaths and subscribed the declaration mentioned in the 3 Wm. & M., c. 2. As the plaintiff is a Roman Catholic, the question is, whether he was bound to take the oath prescribed by the 10 Geo. 4, c. 7 (in lieu of those in the Statute of Wm. & M.), within three months before exercising the office of weighmaster, according to the 6th, * 20th, and 21st sections of the Act; and if he was, * 997 whether it was upon him to prove that he had done so, or upon the defendants to give some negative evidence that he had not.

It appears to us that the plaintiff came within the 21st section of the 10 Geo. 4, c. 7, and that he was bound to take the oath before entering upon the office, for the reasons given by Mr. Baron Greene, in his judgment in the Court below; and we also think that the exception taken to the ruling of the learned Judge, that because the plaintiff had some years before taken the oath as a barrister, he need not be proved to have taken it again, was well founded. It is, in effect, not an exception to the reason merely, but to the ruling, which would cause the defendants to refrain from producing negative evidence to raise the inference that the plaintiff had not taken the oath, and upon that point it appears to us that the tenth as well as the eighth exception should be allowed.

The opinion we have already given is applicable to the questions raised upon the twelfth and fourteenth exceptions, which involve the same points, and therefore, as it appears to us, ought to be allowed.

With respect to the thirteenth exception, we have already, in answer to another exception, given it as our opinion that upon the evidence in this case there was a presumption raised that the

defendant Lennard had done his duty by swearing in the plaintiff to his office, and that the thirteenth exception ought not to be allowed.

Upon the question of misjoinder, we are of opinion that the second count may be properly considered as a count in an action on the case for a disturbance of him in his office of weighmaster by breaking and entering his house, called the market house, and expelling him therefrom, by which he was disturbed in his office, and prevented exercising it in the market town. There *998 are many cases in * which a man may bring trespass or case at his election. In *Pitts v. Gaince*,¹ the master of a ship declared in case for seizing the ship and detaining her, by means whereof he was obstructed in his voyage. Upon objection that the action should have been trespass, as the master was in actual possession, judgment was given for the plaintiff. The case of *Muskett v. Hill*,² is to the same effect; and as the second count in this case is framed, we are of opinion that there is no misjoinder, and that the plaintiff might in this case either have declared in trespass, or, waiving the trespass, have, as he has done, declared in case for the consequential damage to his office by a breaking into the market house, which was his.

MR. JUSTICE CROMPTON, who is now absent upon the circuit, agreed with the other Judges as to objections taken with respect to the oath required by the 10 Geo. 4, but gave no opinion as to the other exceptions.

July 16.

THE LORD CHANCELLOR (LORD CHELMSFORD), having stated the nature of the case, said: My Lords, it will be unnecessary to enter into a minute consideration of all the various exceptions which have been argued at the bar, as it will appear that there are really only two substantial questions for your Lordships' determination: 1st. Whether the plaintiff gave evidence of his appointment to the office of weighmaster, from which a jury might have inferred that the appointment was for life, and not merely during the will and pleasure of Sir Thomas Lennard? 2d. Whether the plaintiff, being a Roman Catholic, was bound to take the oath appointed by the Act 10 Geo. 4, c. 7 (in lieu of the oaths *999 in the Statute 3 Wm. & M. c. 2), before he * acted as weigh-

¹ 1 Salk. 10.

² 5 Bing. N. C. 694.

master ; and, if so, whether it was not to be presumed that he had taken these oaths until the contrary was proved ?

There were other minor questions, which were disposed of in the course of the argument, as to whether the plaintiff could perform the office by deputy ; whether the defendant was entitled to remove the plaintiff from his office without previous notice, and affording him an opportunity of being heard, which depended upon the tenure of the office ; and, whether the venue was properly laid, upon which it was clear that, even if the venue ought in strictness to be local, no objection upon that ground lay at the trial.

Upon the question of the appointment, the defendant's counsel insisted that the office of weigher was one which could not be granted for life, and they cited in proof of it various old statutes passed in the time of Richard 2, Henry 4, and Henry 6, which they contended were in force within Ireland by the Act called Poyning's Law (10 Hen. 7, c. 22), and by which statutes it was enacted, that (amongst other officers) no weigher should hold his office for term of life. But it is quite clear, that the weighers mentioned in these acts are officers who have duties to perform in respect of the customs of the King, and that a weigher in a market town under 4 Anne, c. 14, is a totally different office. The plaintiff, on the other hand, maintained that the appointment must be for life, and he founded himself upon the authority of the case of *Stephenson v. Stephens*.¹ Your Lordships will probably have no difficulty in deciding that the office is a freehold office, whether the appointment was in the defendant, Lennard, as the lord of the manor, or as owner of the tolls ; and that the question to be determined is whether there was *any *1000 evidence of an appointment for life or during good behaviour, either at the close of the plaintiff's case or afterwards in the case of the defendants, which ought to have been left to the jury.

The case upon which the plaintiff relied was his having acted as weighmaster, and having been treated as a person acting in that capacity by the agent of the defendant, Sir Thomas Lennard. There is no doubt that in the case of a public officer, it is in general not necessary to show his appointment, but his acting in the office will be sufficient proof, and that whether the question arises

¹ 11 Irish, Law, 10.

incidentally or is directly in issue, as in *M Gahey v. Alston* ;¹ or is a necessary part of the title to recover, as in *Doe v. Barnes* ;² and I think that a weighmaster of a market town may be considered as a public officer for this purpose, as much as the vestry clerk, under a local Act, in *M Gahey v. Alston*, or the church-wardens, as in the case of *Doe v. Barnes*.

But, then, it was said, that the plaintiff disabled his own case, which was founded upon his acting in the office, by putting in evidence a notice to give up his office, signed by Ellis, as agent to Sir Thomas Lennard, in which it is stated, that the plaintiff held his office as tenant from year to year ; and a discharge signed by Sir Thomas Lennard himself, in which he says, the plaintiff " held the office liable to have the same determined at my will and pleasure." It is alleged, that these documents were put in by the plaintiff for the purpose of proving an admission against the defendants, that he held the office of weighmaster, and not as the plaintiff asserted for the purpose of proving disturbance in his office, for which it is said they were wholly insignificant, though

it may be observed, that they were evidence to establish
* 1001 this part of the case * against Sir Thomas Lennard. But

I think it is a mistake to speculate upon the reason for putting in any piece of evidence. When a document is once in, it is in evidence for all purposes. If the plaintiff proposed to use it as an admission against the defendants, it must have been taken altogether, and could only be available as an admission that he held during will and pleasure. If the defendants sought to use it against the plaintiff, because put in by him, it would not be proof of the truth of its contents, but only that the defendants asserted that the plaintiff held during will and pleasure, and that they acted upon that assertion. The plaintiff, therefore, did not, by putting in these documents, invalidate the presumption arising from his acting that he was duly appointed, as the plaintiff himself did in *Smith v. Cartwright*,³ nor did the defendants' evidence as completely rebut the presumption as it did in the case of *Rex v. Verelst*,⁴ but it still left a case to be submitted to the jury. For although the letter of the 11th of February, 1846, from Ellis to the plaintiff, which the defendants put in evidence, gives an account of the origin of the plaintiff's possession of the office, which,

¹ 2 M. & W. 206.

² 6 Exch. 927.

³ 8 Q. B. 1087.

⁴ 3 Camp. 432.

if correct, would go far to disprove an appointment for life ; and although Ellis in his examination at the trial, said that he " had several communications with the plaintiff on the subject of that letter, that the plaintiff complained of the smallness of the fees, and promised to show his books, stating the profits, but that he could never get the plaintiff to fix a time for doing so, and the plaintiff never went into the account as required," which would strongly confirm the statements in the letter, yet Ellis was never asked as to the truth of those statements, and as the acting in the office, * and the recognition of the plaintiff as weigh- * 1002 master, were of a later date, the Judge, in my opinion, would not have been justified in withdrawing the case from the jury, and therefore I think that the 2d, 9th, and 12th, and part of the 14th exceptions, which involve this question, ought not to be allowed.

The 10th exception, and the remaining part of the 14th exception, raise the question as to the oath to be taken before acting as weighmaster, and as to the onus of proof upon that subject. A great deal of argument was addressed to your Lordships as to whether the plaintiff was entitled to take the oath appointed by the 10 Geo. 4, c. 7, instead of the oaths required by the Statute of 4 Anne, c. 14. It appears to me to be quite unnecessary to consider this question. Either the plaintiff was bound to take the oath under the 10 Geo. 4. c. 7, and then the admission which he required to be made raised a strong presumption against him, that he did not take the oath within a limited time before acting in the office ; or, if the 10 Geo. 4, c. 7, did not apply to the office of weighmaster, then he would be disqualified to hold it, as the oaths imposed by the 4 Anne are such as no Roman Catholic can take. But at the trial all parties proceeded on the notion that the oath which the plaintiff was to take to qualify him for the office was that appointed by the 10 Geo. 4, and it was clearly a misdirection of the Judge to hold that, because the plaintiff had once taken the oath as a barrister, he was not bound to prove that he had taken it with reference to the office, whether this is to be considered as a reason or a ruling. For, if the case had been left upon the presumption that the plaintiff had taken the oath, the defendants might have offered evidence to rebut it ; but the opinion expressed by the Judge plainly intimated to them that such evidence would be useless. The exceptions * applicable * 1003

to this part, therefore, were good, and ought to have been allowed.

With respect to the alleged misjoinder, it is hardly necessary to add a word. I think that the second count is substantially in case, and not in trespass. It complains of the disturbance of the plaintiff in his office of weighmaster, and it describes the means by which that disturbance was effected, viz. by removing him from the market house, and taking away the beams, scales, and weights, in which market house, with the beams, scales, and weights, the plaintiff alleges that he exercised and enjoyed the office, and the wages, fees, and emoluments had and received, and it states the result to be that during all the time aforesaid the defendants prevented the plaintiff from receiving the fees, emoluments, prerequisites, and profits belonging to said office. The removing the plaintiff from the market house, and the taking away the beam, scales, and weights are alleged to be the mode and manner in which the disturbance took place; and although this might have been made the subject of an act of trespass, yet the plaintiff has chosen, as he has a right to do, to declare for the consequential damages to his office from these acts of trespass, instead of making them substantive grounds of complaint.

It is sufficient in this case that one exception should prevail to warrant your Lordships in affirming the judgment of the Court of Exchequer Chamber, and ordering a *venire de novo*.

LORD CRANWORTH. — My Lords, I entirely concur with my noble and learned friend in the result at which he has arrived, that there must be a judgment for a *venire de novo*; in other words, that the judgment below will be affirmed, and *1004 judgment therefore *must be for the defendant in error.

My noble and learned friend has truly pointed out that, upon this question of the oath, which is the material question, it is perhaps in the result not very material whether the weighmaster was or was not bound to take the oaths prescribed by the 10 Geo. 4. I think, however, that it is due to the learned Judges in Ireland, who have considered this case so attentively, to state that having carefully looked into this case, I certainly have come to the conclusion with those learned Judges who took that view of the case, that unquestionably the weighmaster was bound to take it, and that every person exercising that

office is bound to take the oath prescribed by the Roman Catholic Relief Act.

The matter stands thus: By the 9th section of the Act of Queen Anne, which constitutes the office of weighmaster, it is provided that no person shall act as weighmaster before he takes the oaths, and subscribes the declaration mentioned in the Act of Parliament made in England, 3 William and Mary. Upon referring to this Act of Parliament of William and Mary, it appears that that oath is not the modern oath of abjuration, but one which, though substantially the same, no Roman Catholic could take; and the declaration is a declaration against transsubstantiation and the invocation of saints. Therefore, by the Act of Queen Anne, no person could fill the office of weighmaster in any market town who was a Roman Catholic, because he could not take that oath.

I do not think the intermediate Act, which was referred to, of Geo. 3, materially affects the question. I think we may, therefore, move at once in our consideration of this case from the Act of Queen Anne to the Act of the 10 Geo. 4, c. 7, by section 10 of which it is lawful for any Roman Catholic to exercise any civil right upon taking and subscribing at the time, and in the manner in the Act * mentioned, the oath therein required, * 1005 instead of any other oath then by law required. Section 19

provides, that any person admitted to any corporate office shall take the prescribed oath within one month next before his admission thereto. Section 20 provides, that every Roman Catholic admitted to any office of trust under his Majesty shall take the oath within three months next before his appointment, or before he acts.

Then we must look at those two sections, coupled with that which I have previously read. The 10th section says, that any Roman Catholic may exercise any office upon taking the oath prescribed in the manner and at the time hereinafter mentioned. The 21st section says, that if any Roman Catholic shall enter upon the exercise of any office "not having in the manner and at the times aforesaid" taken and subscribed the oath, "he shall forfeit 200*l.*, and the appointment shall be absolutely void."

Now there no doubt is this anomaly in the framing of the Act. The 19th section provides for a particular class of offices, namely, corporate offices; and the 20th section provides for offices of trust under the Crown. The time at which the oaths are to be taken, upon being admitted to any of these offices, is pointed out; but

there is nothing that expressly indicates at what time a person taking upon himself an office, not being an office under a corporation, and not being an office of trust under the Crown, is to take it. The argument was, therefore, that as what he is required to do is to take the oath "at the time and in the manner therein mentioned"; and as no time and no manner are pointed out, he cannot take the oath, and that consequently he is debarred from the benefit of that Act. Now, I cannot believe that it would be right for your Lordships to construe the Act in such a way as not to give the fullest relief to the persons whom, according to

* 1006 * the express recital in the statute, that Act was meant to benefit. It must be expounded literally for the relief of Roman Catholics, and, at the same time, it must be so expounded as requiring them to take the new oath. The doubt is, when the oath is to be taken. This office does not come strictly within either the 19th or the 20th sections. It does, however, come within the 21st section, and I think, by reasonable intendment, the oath ought to be taken before, which must mean immediately before, or, at all events, within a month before the time when the person enters on the duty of his office. Here there was no evidence that this was done. But I think the ruling of the Chief Justice clearly was equivalent to a direction in point of law, that the circumstance of the plaintiff having taken the oath in 1841 was sufficient, so that no evidence of subsequent taking was necessary. I so construe the direction which he gave, and which formed the subject of the eighth exception. And I entirely concur with my noble and learned friend that that direction *quacunque via* was certainly wrong, and consequently upon that ground, whether or not upon the other, it is not material to discuss, for, if you can show that one exception out of one hundred is good, there must be a *venire de novo*. I think that the judgment of the Exchequer Chamber in Ireland ought to be affirmed; that is, judgment for the defendant in error.

LORD WENSLEYDALE. — I entirely concur with my noble and learned friends, and have to offer to your Lordships my advice that the judgment of the Court of Exchequer Chamber in Ireland should be affirmed, and a *venire de novo* awarded; and I apprehend that it should be in the general form, without noticing any particular exceptions.

* These exceptions are grounded on the want of proof by * 1007 the plaintiff, that he had taken the necessary oaths, the oaths of office and the oath of supremacy, required by the Statute of Queen Anne, c. 14, and the oath taken by Roman Catholics under the Roman Catholic Relief Act, 10 Geo. 4, c. 7.

I entirely agree in the answer given by the learned Judges to the question arising on the third exception. It is undoubtedly to be presumed, *primâ facie*, that the oath of office was administered at the proper time, and there is no evidence to raise a contrary presumption. But the Statute 4 Anne, c. 14, § 9, requires that the weighmaster shall not act as such before he has taken the oath required by the 3 William and Mary instead of the oath of supremacy. The same *primâ facie* presumption would prevail in this case that the oath had been duly taken, according to the doctrine laid down in the case of *Powell v. Milbank*,¹ and ought to prevail unless some evidence was given to the contrary. If the oath of supremacy was still by law to be taken, and the plaintiff had been a Roman Catholic all his life, that fact might have raised a contrary presumption, as it is not to be supposed that he would have committed a moral crime by taking that oath contrary to his religious creed, and it would have been incumbent on the plaintiff to prove that he actually took the oath. But the admission that he was a Roman Catholic since his first acting as weighmaster, though it must be taken to mean not simply that he became so at some time since, but was, from the time of the first acting in the office inclusive, a Roman Catholic, cannot be extended to the time before, and his oath taken at any time before, in the form required by the Statute of William and Mary, would seem to be sufficient, and so * there was nothing to repel the *primâ facie* * 1008 inference to be derived from the exercise of the office that all was rightly done. So far, therefore, as relates to all the oaths to be taken under 4 Anne, c. 14, § 9, these exceptions ought not to prevail any more than the third.

But the eighth exception, which is in effect included in the ninth and tenth, presents a different question. The defendants' counsel objected that the plaintiff, being a Roman Catholic, was bound to take the oath prescribed by the Relief Act, 10 Geo. 4, c. 7, prior to and in respect of his acting as weighmaster. The plaintiff's counsel asked for an admission, that the plaintiff had, in 1841, taken

¹ 2 W. Bl. 851.

the oath prescribed by the same Act on his being admitted a barrister ; that being admitted, the defendants' counsel then contended that the learned Chief Justice must direct a verdict for the defendants, inasmuch as the plaintiff had not proved that he had taken the oath pursuant to the statute, but the learned Chief Justice declined so to do, and gave it as his opinion, that as the plaintiff had taken the oath required by the 10 Geo. 4, in the year 1841, it was unnecessary he should repeat the same oath on the subsequent occasion, and to that ruling the eighth exception was taken. Now if the 10 Geo. 4, c. 7, applies to this office, I agree with the opinions of all the learned Judges given in the answer to your Lordships' questions, that the ruling of the Chief Justice was wrong, and the eighth exception, and consequently the parts of the ninth and tenth relating to oaths, were well founded.

It was argued for the plaintiff that this part of the Chief Justice's opinion was not a direction, but only a bad reason for the direction which he gave, that the plaintiff need not prove the taking of that oath, and that such direction was quite right. But I

think it cannot be so considered. The Chief Justice by so * 1009 ruling materially altered the defendants' * course, for it prevented them from offering evidence to raise a presumption that the plaintiff did not take the oath. In effect, the Lord Chief Justice must be considered as having said, You need not offer such evidence ; it will be of no use, for the barrister's oath is sufficient.

I think, therefore, that this exception ought to prevail, if the case of the weighmaster is within the 10 Geo. 4, c. 7, as it seems to me to be. I cannot think it possible that the Legislature could have intended that Roman Catholics should be excluded from that office, which they would be if the oath required by the Statute of William and Mary were still necessary.

The Act of the 10 Geo. 4 must be considered as intended for the general relief of Roman Catholics, and to enable them to hold all offices except those expressly excepted and may be so construed. The 10th section enables them to hold all civil and military offices under the Crown, and to exercise any other franchise or civil right (except as excepted), upon taking and subscribing, in manner thereinafter mentioned, the oath before appointed, instead of the oaths of allegiance, supremacy, and abjuration, or any oaths required from Roman Catholics.

The 19th section relates only to any office of magistracy, of place of trust, or employment relating to the government of a separate borough, which this office is not.

The 21st section appears to me to imply that the Roman Catholic holder of any office or franchise whatever, is to take the oath prescribed by the Act under a penalty, and at some time before required by the Act. In this respect the Act is obscure, but some time is undoubtedly meant. The time with respect to corporate offices, or those connected with the government of boroughs, is within one month before, or on the admission to the office. As to offices under the Crown, it is within three months before * the appointment, or before the appointee shall exercise, * 1010 enjoy, or act in the office. The oath ought to have been taken either within the month or within the three months, or on beginning to exercise the office, it is uncertain which; and the safer course would be, no doubt, to take the oath on beginning to act, or one month before beginning to do so, which would be good if the time stated in the 21st section, namely, three months, was the right one; but if the oath is not taken at all, the office becomes void.

The objection, therefore, that the plaintiff had not taken the oath within either of these periods, or before entering on the office, is in my opinion fatal, and I cannot find that any thing in the previous Act of 33 Geo. 3, c. 21, applies to such an office, as the Lord Chief Justice Monahan seems to have thought this office to have been; and the provisions of the 21st section do not, in my opinion, help the plaintiff. The result is, that there must be a *venire de novo*; and if there is some negative evidence that the oath has not been taken, so as to throw the proof of having taken the oath upon the plaintiff, he cannot succeed on the new trial. It may be possible, however, that on the second trial the same points may arise, on which similar exceptions may be taken as those on which the learned Judges have given their opinions. I think it right, therefore, to state that I entirely agree with their opinion as to the 3d and 5th and 13th exceptions, that they are all unfounded.

I also entirely concur with their opinion as to the alleged misjoinder. The injury complained of might be made the subject of an action on the case for the disturbance of the office, and the deprivation of the fees and emoluments belonging to it, by pre-

venting the plaintiff from enjoying the market house and using the scales and weights, on which action the damage sustained by the disturbance of the * office would be recoverable; or an action might be brought for the trespass in ejecting him from the house and depriving him of the scales and weights, in which the damage to be recovered would have been the loss of the occupation of the market house and the value of the scales and weights if not restored, or the loss of the use of them if restored, and the loss of the profits of the office if laid as consequential damage.

There are several cases besides those cited by Mr. Justice Wightman which are analogous to this. An overhanging cornice to the eaves of a house may be the subject of an action of trespass or on the case.¹ So the non-repair of fences whereby the defendant's cattle escape and trespass; *Star v. Rookesby*.²

But I entertain, to say the least, the greatest doubt as to the propriety of the opinions of the learned Judges on the other exceptions, notwithstanding the respect I feel for such authorities. It seems to me, I own, that there was sufficient evidence of the plaintiff's title to go to the jury. I agree with them that the office must be taken to be freehold, but the exercise of that office for several years is evidence of a due appointment to it even against Sir Thomas Lennard, as also is the acknowledgment by Mr. Ellis; and the notice to determine the office, either as an office at will or from year to year, even if offered in evidence as a recognition of the plaintiff's title, and therefore made evidence altogether, is still matter to be considered by the jury, who may believe one part and not the other, especially as the statements of the tenure of the office vary, one party alleging that it is an office at will, and the other alleging that it is an office for life. If offered

as evidence of a disturbance of the office, the assertion of
 * 1012 the tenure of such office by the * defendant is no evidence against the plaintiff, on the principle laid down so satisfactorily in the case of *White v. Morris*³ by Lord Chief Justice Jervis and the Court of Common Pleas, from which the subsequent case of *Haylock v. Sparke*⁴ in the Court of Queen's Bench, seems to me by no means satisfactorily distinguished.

¹ Com. Dig. Action on the case for a nuisance.

² 1 Salk. 335.

⁴ 1 Ellis & B. 471.

³ 21 Law J., N. S., C. P. 185.

The fourteenth exception cannot, it seems to me, be sustained. I agree that if the evidence was properly weighed by the jury it would be very highly probable that the verdict would be for the defendant; but I cannot think it would have been right to put the question in the concise manner in which the exception states it ought to have been put. For example, if the jurors believed all the evidence Ellis's included, ought they to conclude that the plaintiff took possession of the office without any appointment, as stated in Ellis's letter, which is contended to have been acquiesced in by the plaintiff, when Ellis does not state that the fact was so, and, although he was examined, was not asked any question on the subject? Under such circumstances, ought the jury to rely on the presumed acquiescence, as showing the truth of a statement made by a witness, when the witness does not swear that it was true?

It is not necessary to make any observations upon the other exceptions, upon which my noble and learned friend the Lord Chancellor has already commented; upon those exceptions the learned Judges have not been consulted. They are clearly ill-founded.

LORD CRANWORTH. — Before my noble and learned friend puts the question, I think it right to state, for the satisfaction of the parties, that Lord Brougham, who is not now present, told me before he left London (I do not mean to * say that he *1013 went in detail into the case), that he entertained a strong opinion that there ought to be a *venire de novo* in this case.

Judgment of Court of Exchequer Chamber in Ireland affirmed with costs.

Lords' Journals, 16th July, 1858.

WILLIAMS v. LEWIS.

1859. March 11, 12.

GWENLLIAN WILLIAMS, *Appellant*.MARGARET LEWIS and others, *Respondents*.*Will. Term. Accumulation. Remoteness. Estate Tail.*

A testator gave certain leaseholds to trustees for a term of thirty years, to receive rents and profits, and pay debts and legacies, to accumulate the rents, &c.; to permit his son Benjamin to take the rents for his own use "until the son of my son Benjamin (if he shall have a son) shall attain twenty-one; and then I give and bequeath the premises to trustees, to preserve contingent remainders, but to permit such son to receive the rents and profits for his natural life, and after his decease to the heirs male of such son and the heirs male of their bodies: and for default of such issue, I give the premises to the trustees to permit my son Lewis," and then followed the same provisions with respect to Lewis as those which had been previously made with respect to Benjamin, and in default, &c. the premises were again given to trustees to preserve remainders, and then came a repetition of the former provisions in favour of "the son of my daughter Abigail." Benjamin and Lewis successively entered into possession of the leaseholds, and died without male issue; Abigail had a son, who attained twenty-one: —

Held, that the devise over after Benjamin was not void for remoteness, but that Abigail's son took an estate tail, the rule as to freeholds being in this case properly applicable to leasehold estates.

Held also, that the direction to accumulate in respect of the term of thirty years was not void, for the legacies payable by the will were only legacies given to persons then in being.

THIS was an appeal from a decree of the late Lord Chancellor (Lord Cranworth), which had affirmed a decree of Vice-
 * 1014 Chancellor Kindersley. The appellant claimed * as residuary legatee of Lewis Williams the elder, under a will made on the 3d October, 1799. The testator, who was possessed of leasehold estates in the county of Brecon, for the residue of two terms of nine hundred and ninety-nine years, gave and bequeathed to trustees his estates, messuages, tenements, lands, and premises there "for and during the term of thirty years, upon trust, to receive the rents, issues and profits, and, in the first place, to pay and discharge all such debts and sums of money as shall be due and owing" at the time of his decease; and after payment of his

just debts then, "upon trust, that the trustees shall receive the rents, issues and profits of all and singular the premises so devised to them, and the same lay out and continue at interest upon the best security or securities that they can get for the same; and shall accumulate the same yearly, by making the interest thereof principal, and to bear interest until the several legacies herein-after given and bequeathed, and hereby made chargeable thereon, shall be satisfied and paid, and from and immediately after the said legacies shall be paid, satisfied and discharged, or immediately after a sufficient sum or sums of money shall be had and received for that purpose, by and out of the rents, issues and profits of the said premises, then I give and bequeath the said premises, &c. unto" the trustees (naming them) and their heirs, for and during the term to him granted, at and under the rent by the lease reserved, "upon trust, that they, the trustees, shall permit and suffer my son, Benjamin Williams, to have and receive, and take the rents, issues and profits thereof, and of every part thereof, to and for his own use, until the son of my said son Benjamin, if he shall have a son, shall attain his age of twenty-one years." And from and immediately after such son of Benjamin should attain his age of twenty-one years, then the testator bequeathed the premises to trustees, upon trust, to preserve contingent

* uses and remainders, "but nevertheless, to prevent and *1015 suffer such son to have, receive, and to take the rents, issues and profits thereof for and during the term of his natural life; and after his decease, to the heirs male of such son; and for want of such issue, to the second, third, fourth, fifth, and all and every other son and sons of the body of the said Benjamin lawfully to be begotten, and the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing." And for default of such issue, he gave and devised all and singular the said premises to the trustees, upon trust, to permit Lewis Williams, another of his sons, to receive the rents and profits till he should have a son who attained twenty-one, and immediately after such son should attain twenty-one, to the trustees, to preserve contingent uses and remainders, but to permit and suffer such son to receive the rents and profits for his life, and after his decease, to his heirs male, and for want of such issue, to the second, third, and fourth sons, and of the testator's son, Lewis Williams, and in the same terms as the gift to Benjamin and his

son. And then, "for default of such issue, I give and bequeath all and singular the said premises to the trustees before named, upon trust, to receive the rents, issues, and profits thereof to and for the use and benefit of the son of my daughter Abigail, lawfully begotten, until he shall attain the age of twenty-one years; and from and immediately after such son shall attain his said age of twenty-one years, upon trust to permit and suffer such son to have, receive, and take the rents, issues and profits thereof to and for his own use and benefit, for and during the term of his natural life; and from and after his decease, to the heirs male of such son, and for want of such issue, to the second, third, fourth, and all and every son and sons of the body of Abigail lawfully to be * 1016 begotten," in the same terms as * before. There was then a clause, giving the "residue of my personal estate, of what kind or nature soever, and wheresoever, to my wife, and my son Philip, and my daughters Abigail and Winifred, share and share alike."

The testator died in 1799, leaving his eldest son Philip his executor and residuary legatee, and his sons Benjamin and Lewis, and his daughter Abigail, devisees as already stated. His son Benjamin entered into possession of the leaseholds, and died in January, 1832, a bachelor. Lewis then entered into possession, and died, without male issue, in May, 1846. Abigail had died in 1809, but she left a son, E. W. Lewis, and a daughter, Margaret. This son attained twenty-one in the year 1827, and died in the following year a bachelor, leaving his sister Margaret (the present respondent) his personal representative. The testator's son Philip died in 1837, leaving his widow (the appellant) the sole executrix, and the sole personal representative of himself and of the testator.

In 1855 the respondent, Margaret Lewis, filed her bill against the appellant and the representatives of the trustees (who disclaimed any interest) for the recovery of the devised leaseholds. The cause was heard before Vice-Chancellor Kindersley on the 11th November, 1856, when his Honor gave judgment in favour of the plaintiff, and made a decree directing a proper assignment to be made to her of the leasehold premises in question.¹ The cause was reheard before the Lord Chancellor on the 27th January, 1857, when the original decree was affirmed. This appeal was then brought.

¹ 3 Drewr. 668, nom. *Lewis v. Hopkins*.

Mr. Malins and *Mr. Harris Prendergast* for the appellant. — The limitations in this will, subsequent to those in favour * of the son of Benjamin, are void for remoteness. The * 1017 appellant here is the residuary legatee, and if these subsequent limitations are void, the property becomes part of the residue.

The decision of this case in the Court below proceeded on the ground that if this had been real estate the limitations would have created an estate tail, and that by this rule being applied to personalty they created an absolute interest. There is no rule which warrants such a decision. That analogy may be, but is not, necessarily, applicable to a case like the present. The rule is only to be applied when it will best effectuate the intentions of the testator. It will not do so here. The Thellusson Act makes void every devise which does not take effect, if a bare period of years, within twenty-one years, and if measured by life, then during a life in being and twenty-one years after it.

[THE LORD CHANCELLOR. — This will is dated in October, 1799, and the Thellusson Act did not pass till June, 1800.]

The Act is only referred to by way of illustration; it does not affect this case. A period of accumulation for thirty years was illegal before the Act, and is so still.

Benjamin is to have this property, not for the whole of his life, but till his son attains the age of twenty-one. Attaining that age is clearly a condition precedent to taking any thing. But even when the son attains that age the premises are given to trustees to preserve contingent remainders, which shows that the testator did not intend that the son should take an absolute interest in the estate itself even at twenty-one. The eldest son of Benjamin had, on attaining twenty-one, merely a qualified interest, and his heir male was intended to take not derivatively through the father, but independently as a purchaser, so that these are in effect a series of executory devises. After the death of the son the property is not disposed of, but falls into the residue. Suppose the * eldest son of Benjamin not to attain twenty one, and to * 1018 die leaving male issue, who would take? The son of Benjamin could not take, for he died before attaining twenty-one; the son of the son could not take, for he would not take direct from his father, who took no estate, and he could not take by purchase, for in that way it would be void from remoteness. The estate

would go over to the next son, and the gift to the eldest son, and his issue would be defeated.

[LORD KINGSDOWN. — Is it not a gift to Benjamin till he has some son to attain twenty-one ?]

Hardly so. There are not many cases to be cited. The first is *Knight v. Ellis*.¹ There the testator gave the accumulation of rents till A. should attain twenty-one, to be laid out and to permit A. to receive the interest during his life ; after his death to the issue male of A., and in default to the plaintiffs. A. died without issue. Had there been issue, Lord Thurlow said they could have taken as purchasers, and, therefore, there being none, he was of opinion that the limitation to the plaintiffs took place. That case laid down the principle that the rule as to real estate was not in cases of this sort inflexibly to be applied to personal estate, and that principle was expressly adopted after the most deliberate consideration in *Ex parte Wynch*.² It had already been so decided in *Forth v. Chapman*.³ If Benjamin had had a son who had attained twenty-one, all the subsequent limitations must have been void for remoteness. The rule now contended for would have applied even had the words been “ heirs of the body.” There are cases in which, with respect to personalty, they too may be treated as words of purchase. *Hodgeson v. Bussey*,⁴ *Sands v. Dixwell*.⁵

* 1019 * [LORD CRANWORTH. — Here it is in trust.]

That does not make any difference. In *Clare v. Clare*⁶ one thousand years was given to trustees in trust for T. C. for so many years of that term as he should live, and after his death in trust for the issue male of T. C. for so many years as such issue male should live, when extinct then to W., and so on. T. C. died without issue male, and it was held that the residue of the term should go as part of the residue to the representative of T. C. contrary to the will in which there was a plain affectation of a perpetuity. The rule thus stated is referred to with approval in *Fearne*.⁷ Here the testator intended that the issue of the first son should take as purchaser, and that his children should take, not through, but independently of, him ; but in attempting to effect this object,

¹ 2 Brown, C. C. 570.

⁵ 5 De G., M. & G. 188.

¹ 1 P. Wms. 663.

⁴ 2 Atk. 89.

⁶ Cited in *Garth v. Baldwin*, 2 Vez. Sen. 652.

⁶ Cas. Temp. Talb. 21.

⁷ On Rem. pp. 375, 487.

he has gone farther than the law will permit. The creation of the successive trusts to preserve contingent remainders shows that the testator intended to create a mere succession of life estates, and not to allow any one of the tenants for life to destroy the remainders when he came into possession.

The gift in this case is void for remoteness, for, the law will not allow a suspension of vesting to what may be, but only to what must be, within the prescribed period. *Palmer v. Holford*,¹ *Speakman v. Speakman*.² Now, here the accumulation is for an absolute term of thirty years.

[LORD CRANWORTH. — Not necessarily for thirty years, but not for more than thirty years. If the debts and legacies shall be satisfied before then, the term will end.]

But it is not sufficient that the accumulation may terminate, the law requires that it must. *Lord Dungannon v. Smith*,³ *Oddie v. Brown*.⁴ Here nothing goes to Benjamin or his son till the period of thirty years is accomplished, * unless there is * 1020 a positive certainty that the trusts will be satisfied. The period of enjoyment is postponed too long; the dispositions in the will fail altogether, and the property forms part of the residue.

[LORD KINGSDOWN. — Suppose he had said nothing about thirty years, but had devised an accumulation till his debts and legacies should be satisfied?]

That would have been a charge of debts and legacies on the estate, and the Court of Chancery would have decreed a sale.

[LORD KINGSDOWN. — Suppose it had been a direction so to apply the rents and profits of the estate?]

That would have been a gift of the corpus of the estate. But when an accumulation is directed, you must see what is the end of the period directed for the accumulation. Here that is too remote, *Southampton v. Hertford*.⁵

Mr. J. Bailey and *Mr. Wellington Cooper*, for the respondent, were not called on to address the House.

THE LORD CHANCELLOR (LORD CHELMSFORD), after stating the will, and the questions raised upon it, said: The rule as to the effect

¹ 4 Russ. 403.

⁴ 4 Jur. N. S. 605.

² 8 Hare, 180.

³ 2 Ves. & B. 54.

⁵ 12 Clark & F. 546.

of a bequest of personal estate by words which would create an estate tail in freeholds is well stated in *Roper on Legacies*¹ to this effect. If personal estate be given by testament to A. and the heirs of his body, as such words would create an express estate tail in freehold lands, if applied to them, so in personal estate, if applied to it, such words will have the effect to vest the absolute interest, because such property cannot be entailed, *id est*, the first taker will have the absolute interest in the bequest, and the remainder, or executory limitation to the heirs of his body, and the subsequent limitation, if any, depending in a failure of them, will be of no effect.

* 1021 * It was not contended, on the part of the appellant, that the rule did not exist; but it was stated, that the rule was not an inflexible one, that it operated only to effectuate, and not to defeat the intention of a testator. And for the purpose of showing that where the construction, by analogy, to a devise of freehold estate will have the effect of defeating the intention of the testator, there the words "heirs male" should not have the effect of giving to the party to whom the previous estate was given an absolute interest in the property: the case *Ex parte Wynch*,² was cited. There the bequest was to a married woman of an annuity for her life, and the issue from her body lawfully begotten, on failure of which to revert to her heirs, with a request that K. and C. would act as trustees for her, so that the annuity might be secured for her sole use and benefit. It was held to be a life interest only, with a gift in the nature of a remainder to the issue. But the words in that case were "issue lawfully begotten," words that are much more flexible than the words "heirs male," which are here used. That observation is made by my noble and learned friend, Lord Cranworth, in his judgment in that case. He says: "In the cases just mentioned, the words were 'heirs of the body,' which, as we know, are technical words almost mysteriously inflexible; but in cases, also, where the more manageable expression 'issue' occurred, still, where there was nothing to show that the word was not intended as a word of limitation, or an intention to confine the first taker to a life estate, it has been held to be in the nature of a word of limitation when used with reference to personal estate equally with the words, 'heirs of the body.'" And then various cases are cited supporting that proposition.

¹ Ch. 22.² 5 De G., M. & G. 188.

But the appellant's counsel undertook to show, that * even the words "heirs of the body" had in personal *1022 property been held to be words of purchase in order to effectuate the intention of the testator; and for this purpose he cited several cases, two of which only it will be necessary to mention, the case of *Hodgeson v. Bussey*,¹ and the case of *Sands v. Dixwell*.² The case of *Clare v. Clare*, which was also cited, was a case in which the words were "issue male lawfully begotten," and, therefore, it is not so closely applicable as the others. In the case of *Hodgeson v. Bussey* a term of fifty-nine years was given by a post-nuptial settlement, in trust, "to permit the wife, Grace Bussey, to recover the rents and profits for her sole and separate use during the term, if she should so long live; and, after her decease, to permit Edward Bussey, the husband, to enjoy the profits thereof during the remainder of the term, if he should so long live, and after his decease, in trust, for the heirs of the body of Grace by Edward Bussey begotten, her executors, administrators, and assigns." And Lord Hardwicke held, that the words "heirs of the body" were not words of limitation, but words of purchase. *Sands v. Dixwell* was a case where the freeholds and leaseholds were devised in trust to convey to the separate use of the deviser's daughter for life, without the intermeddling of her husband, and, after her decease, in trust to the heirs of her body. And Lord Hardwicke held, that as to the leasehold, the words "heirs of the body" were words of purchase, and that the direction to the separate use of the wife showed that it meant that she was to be tenant for life. *Hodgeson v. Bussey* was the case of a settlement, which, although it was executed, yet being intended as a provision for the children of the marriage, the intention that it should not vest absolutely in the wife was evident; besides, the super-added words, "executors, administrators, and assigns," showed clearly that "heirs of the body" were not meant *1023 as words of limitation. In *Sands v. Dixwell*, the trust was to the executors, the devisees in trust were to convey. The intention, therefore, had room to operate, and the trusts for the separate use of the wife were considered a plain indication of that intention.

It is to be observed that in these cases the intention was collected from the words of the will. Here the appellant assumes an inten-

¹ 2 Atk. 89.

² 2 Vez. Sen. 652.

tion different from the words used, and then contends that that construction of the words which is supported by authorities would defeat that intention. It was said, in the course of the argument, that it was to be regretted that Courts had clung so closely to the established construction of words, and had not yielded more to the testator's intention. On the contrary, I think it better to adhere as much as possible to the meaning of appropriate words, unless there are the clearest indications that they are used in a different sense. The rules of technical construction not only impose a proper restraint upon the Judge's discretion, but inform parties how they can express their meaning, without danger of having their intentions defeated.

It would be difficult in this case, capricious as some of the dispositions in this will are, to assign with any safety the existence of any particular intention. As the testator proposed to supplant his son Benjamin, when Benjamin's son attained twenty-one, as he might have intended that if the son attained twenty-one, he should have an absolute interest in the property. To suppose a different intention, and from that to construe the words "heirs male" to be words of purchase, would be to assume that the testator intended that if Benjamin died without a son who attained twenty-one, the estate should not go over to his son Lewis, but that he meant to create limitations which were void in their creation. I

think that we ought not to speculate here upon intentions,
 * 1024 * but that taking the bequest according to ordinary construction, applying it to the analogy of freehold limitations, the words "heirs male" must be regarded as words of limitation; and as they would have given Benjamin's son an estate tail in freehold, so according to the settled rule they will give him an absolute interest in the leasehold property. Benjamin, therefore, having left no son who attained twenty-one, the subsequent limitations were alternative limitations, which took effect on the failure of the former, and consequently the decree upon the only point raised in the Court of Chancery is quite correct.

But before your Lordships another point has been raised, though still involving the same objection of remoteness arising out of the trust for accumulation for the payment of debts and legacies under the term of thirty years. On the authority of *Oddie v. Brown*, and another case which was mentioned this morning, *Palmer v. Holford*, it was insisted that where there is a trust for

accumulation, for an arbitrary period, assumed for the purpose of the accumulation, and the estate is afterwards given to persons who are not in existence and who cannot be known at the time, the trust for accumulation tends to a perpetuity, and is void. But in this case I find great difficulty in understanding how it is possible to say that there could be any thing like a perpetuity. The object of the trust which was applied to the thirty years' term, was to provide for the payment of the legacies. Supposing that the trust had been that the trustees were to apply the annual rents and profits in satisfaction of the legacies during the term of thirty years, there can be no doubt that that would have been perfectly good, that it would not have been void according to any of the authorities, nor would it have been within the objection of perpetuity. But the provision which is made is a provision of accumulations for the payment of legacies (in fact it only applies to legacies), but then when we come to see * what * 1025 the legacies are to which this trust applies, we find that the objection of perpetuity is instantly put an end to, because the only legacies which I can find in the will of the testator is a legacy of 600*l.*, which is to be paid to a person upon her arriving at the age of twenty-one. Then, in truth, the object of this trust is to accumulate the rents for the payment of that legacy, which is the only one, and that accumulation cannot continue beyond the period allowed by law, viz. a period of twenty-one years after the death of the testator; and the consequence is, that, whatever may be argued upon the subject of a dry accumulation of rents for an arbitrary period assumed by the testator, in this case there is a definite limit given to the accumulation, by the character of the legacy in respect of which the accumulation is to take place.

I therefore suggest that there is nothing whatever in this point to render the bequest void upon the ground of remoteness, and I submit to your Lordships, that the decree of the Court below ought to be affirmed.

LOED WENSLEYDALE. — My Lords, I have really not a word to add to what my noble and learned friend has said in expressing his opinion on the first part of this case, which was discussed in the Court below, and decided by my noble and learned friend Lord Cranworth. As regards the new point raised here with respect to the trust of the term, it seems to me that this amounts to nothing

more than a charge of 600*l.*, and the term which is secured for its payment, either by rents or profits, or by accumulation of rents, I cannot consider in the slightest degree tends to perpetuity. I therefore entirely concur in the opinion my noble and learned friend has expressed, that this judgment ought to be affirmed.

LORD CRANWORTH. — My Lords, the only reason I have for adding my adherence to what my noble friend on the Wool-
* 1026 sack has *proposed, is lest it should be thought that I entertain any doubt of the propriety of the decision below. I should have been well pleased if I had thought it consistent with my duty to retire, and hear nothing on the subject; but I do not think I should have been acting rightly in so doing. Although I have not thought fit to interfere in the case, I can only say that I retain the opinion I then expressed. In this particular case, if we were to construe the will as is proposed by the appellant (I am alluding to the question discussed before the Court of Chancery), we should, in my opinion, be going out of our way to defeat the intention, because it is perfectly obvious that, in the events which have happened, this is exactly what the testator meant, viz. that the child of Abigail should take. He meant, no doubt, that he should take in tail, but that was because he did not understand the law of property, and he thought that these leaseholds might be taken as a freehold estate. We should be diverging from the ordinary rules of construction, merely for the purpose of defeating the perfectly manifest intention of the testator if we did not affirm the judgment.

With regard to the other point, I quite agree with my noble and learned friend; the moment it is understood by looking at the language of the will, it is seen that there is nothing in it. There is a term created to raise money to pay debts which were ascertained at the death, and to pay a legacy of 600*l.* Subject to that, the property is given in the way stated. I therefore entertain no doubt on the subject.

LORD KINGSDOWN. — My Lords, it is unnecessary for me to say any thing more than that I concur with my noble and learned friends.

Decrees affirmed, and appeal dismissed, with costs.

I N D E X.

ACCOUNTS. See RESIDUE.

ACCUMULATION. See WILL, 17.

AGENT. See FRAUDS, STATUTE OF.

AGREEMENT. See CONTRACT, FRAUDS, STATUTE OF.

ALLOCATUR. See ATTORNEY, 3.

"AND." See WILL, 3.

ANNUITY. See WILL, 1.

APPEAL.

A disallowance by the Master of a claim made under the Winding-up Acts is the subject of an appeal. — *Ernest v. Nicholls*, 401.

ARREST. See SHERIFF.

ASSETS (GENERAL ASSETS). See WILL, 11, 16.

ATTORNEY-GENERAL. See CHARITY.

Where the Attorney-General, having no independent rights of his own, stands only in the same situation as those who are entitled to the benefit of a charity, if they would be barred by lapse of time, he is equally barred. — *St. Mary Magdalen College v. The Attorney-General*, 189.

ATTORNEY AND SOLICITOR. See COSTS.

1. There is no obligation on an attorney or solicitor to produce his client for the purpose of being served with process by a third person, and a security obtained by the solicitor from his client during the period of the client's concealment will not be thereby avoided in favour of such third person. — *Shaw v. Neale*, 581.
2. An attorney or solicitor has no lien on an estate recovered for a client in respect of the costs and expenses incurred in recovering it (*Barnesley v. Powell*, Ambl. 102, overruled). He has a lien only on the papers in his hands. — *Id.*
3. An attorney held an assignment of two terms to attend the inheritance of an estate recovered by him for his client. On a rule being made to tax his costs, it was part of the rule that the Master should decide whether, and if so, upon what terms, *the attorney should *1028 execute to his client assignments of these terms. The Master having made his *allocatur*, directed that the attorney should, on payment of what was due, or on security for the same being given to his (the Master's) satisfaction, execute assignments of these terms at the cost of the client: —

Held, that this did not constitute a charge on the estate so as to give the attorney a priority from the date of the *allocatur*; for that the Master had no power to direct that these terms should stand as a security for the amount of the costs. — *Id.*

AUCTION.

1. The practice of opening biddings (which is one of doubtful advantage) is not applicable to a sale of property by private contract. — *Barlow v. Osborne*, 556.
2. Property was directed to be sold by the Court of Chancery. The advertisement announcing the sale described it as a "sale by private contract." The sale was to be made subject to receiving the sanction of the Vice-Chancellor, and subject to certain conditions, among which were these: that persons intending to purchase were to send in sealed tenders, which would be opened by the chief clerk to the Vice-Chancellor, under whose order the sale was made; that the chief clerk, after the lapse of four days, would certify who was the purchaser; and that this certificate was "in due course to be signed and filed, and become binding without further notice or expense to the purchaser": —

Held (affirming the order of the Court below), that though this was described as a "sale by private contract," it had all the incidents of a sale by auction, and therefore that the practice of opening biddings might be applied to it. — *Id.*

3. Under the new practice introduced by the 15 & 16 Vict. c. 80, §§ 32, 33, 34, and the General Orders of the Court of Chancery of July, 1851, and (Nos. 49–51) of October, 1852, the contract, in a sale of this kind, does not become absolutely binding until after a lapse of eight days from the filing of the certificate. Within that period an application may be made for an order to open the biddings. — *Id.*
4. Such application may be made by a person who is not a "party to the proceedings." — *Id.*
5. A purchaser who has received back his deposit, under an order to open biddings, is not thereby precluded from objecting to such order. — *Id.*
6. *Quære*. Whether a sale by auction and a sale on sealed tenders can be considered as identical? — *Id.*

* 1029 • BIDDINGS, OPENING. See AUCTION, SALE.

BOND.

By the marriage settlement of R. B. in 1767, there was (in addition to other things) a sum of 1500*l.*, secured for the portions of younger children of the marriage, to be apportioned as he might think fit. In 1806, his daughter (a younger child) married G. G., and on occasion of that marriage R. B. executed two bonds to secure payment of two sums, 1000*l.* and 500*l.*, payable on his death, the former not to bear interest till his death; the latter to bear interest from the execution of the bond. These bonds were accompanied by warrants of attorney, on which, however, judgments were never entered up. On the same day a marriage settlement was executed, which vested these two bonds in T. B. (R. B.'s son and heir at law) and J. H. C. as trustees (they being likewise so described in the bonds themselves), on trust to pay the interest to G. G. and his wife

during their lives, and after their deaths in trust for the children of the marriage, in such shares as G. G. should appoint; otherwise equally. No appointment was made. In 1807, T. B. married, and on his marriage a settlement was executed, by virtue of which the estates of R. B. were conveyed to trustees for the term of three hundred years on certain trusts, one of which was to raise a sum of 5000*l.*, and apply the same in the first instance to pay the 1500*l.* the portions for R. B.'s younger children, and the rest to the payment of such specialty debts as "are now due and owing" by R. B.; and if there should be any residue, to pay over the same to R. B. Subject to this term, the estates were conveyed to R. B. for life, to T. B. for life, and to the first and other sons of T. B. in tail male. R. B. died in 1816, and T. B. entered into possession of the estates. R. B.'s widow took out probate of his will, and received general assets to the amount of 7500*l.* T. B. died in 1836. Interest on the sum secured to G. G. was paid, during his life, by the agent of T. B., and of his son R. B. the younger, who had succeeded under the settlement of 1807 to the estates. A part of the sum of 5000*l.* was raised in 1844, and the 1500*l.* secured by the settlement of 1767, as portions for younger children paid off, but the 1500*l.* secured by the bonds were not raised. In 1846, G. G. died. There was no evidence of payment of interest after his death. In 1848 the children of G. G. filed their bill against R. B. the younger, R. G. (one of their brothers, who for the purposes of the suit had taken out administration *de bonis non* to R. B. the elder), *and against the *1030 possessor of the term, praying that the money secured by the bonds might be satisfied out of the term, &c. An inquiry and accounts were directed, and a report made and confirmed on further directions. An appeal was then brought against the original decree and this decree on further directions: —

Held, that under the special circumstances existing here the suit was maintainable; that though the personal representative of R. B. the elder was primarily answerable, yet, as the trustees of the bond debt could only sue the person in whom the term was now vested, as that person must then sue R. B. the younger as holder of the estate which was subject to the term, and as R. B. the younger, besides being the holder of that estate, was also the representative of T. B. the trustee of the bond debt under the settlement of 1806, a Court of equity, seeing that all the parties really interested were before it, would not, especially after an inquiry and report, dismiss the bill for matter of form, and thus create a necessity for such a multiplicity of needless suits. — *Burrows v. Gore*, 907.

Held also, that the settlement of 1806 created a trust in respect of the bond debt; that that debt was not within the words of the settlement of 1807 a debt of R. B., then "due and owing," but that it would have been so had the trustees performed their duty by entering up judgment on the warrants of attorney, and that their neglect in this respect could not be set up as a defence by R. B. the younger, as the owner of the estate, he himself being also the representative of the surviving trustee, and, as such, bound to obtain payment of the money secured by the bond. — *Id.*

Per LORD ST. LEONARDS.—These bonds were equitable charges on the land. — *Id.*

Held (Lord Wensleydale *diss.*), that the Statute of Limitations, 3 & 4 Wm. 4, c. 27, did not operate as a bar to this suit, an express trust of a charge upon land being by the true construction of that statute as much saved from its operation as an express trust of the land itself; and as Robert Burrowes the younger represented his father (the surviving trustee of the bonds), and was himself the owner of the estate out of the term in which these bonds were by the trusts of the deed of 1807 to be satisfied, he was at once the hand to pay, and the hand to receive, and he therefore could not set up the statute as his defence for not performing the trust. — *Id.*

- * 1031 *Held* also, that the right of these *cestuis que trust* did not arise *till the death of G. G. in 1846, and that as they had brought their suit within two years afterwards, the 3 & 4 Wm. 4, c. 27, did not in fact apply to them. — *Burrowes v. Gore*, 907.

BRIBERY. See PARLIAMENT.

CALLS. See MINE.

CHARGE. See COVENANT, 3. JUDGMENT. REGISTRATION. TRUSTS AND TRUSTEES, 5.

CHARITY. See COSTS. MORTMAIN ACT.

1. The presumption in a gift of lands for charitable purposes, is that they are devoted "for ever" to the purposes of the charity, and that no authority to sell them is intended; but a sale of such lands at a distant date, with long acquiescence in such sale, and no account of the origin of the charity, may give rise to a presumption that there had been a power enabling the holders of the charity lands to sell them, and that the sale was made under that power. — *St. Mary Magdalen v. The Attorney-General*, 189.
2. Charities are trusts, and are, as such, within the operation of the 3 & 4 Wm. 4, c. 27. — *Id.*
3. The first section of the statute extends the word "person" to a class of persons as well as to individuals. The poor of a parish are a class of persons within the meaning of that section. — *Id.*
4. Where the Attorney-General having no independent rights of his own, stands only in the same situation as those who are entitled to the benefit of a charity, if they would be barred by lapse of time, he is equally barred. — *Id.*
5. Lands were given for the benefit of the poor of two parishes, and were placed under the management of the rectors and church-wardens, who, with the consent of the vestries, might lease them. The rectors, &c. executed a lease of them for ever to the president and scholars of a college subject to a fixed rent charge. Above sixty years after the execution of this lease (the fairness of which at the time of its execution was not impeached), the Attorney-General filed an information against the lessees, praying that it might be cancelled:—

Held, that the real plaintiffs in this suit were the poor of the two parishes; that they were in the situation of a *cestui que trust*; that the suit by infor-

mation of the Attorney-General (who had no independent rights) was a suit by them; that they could not maintain such suit unless against their trustees except within twenty years; that this was not such a suit, but was a suit against purchasers for value, and therefore that it was barred. — *Id.*

* 6. Where a testator gives for charitable purposes, to A. the whole *1032 of an estate, or all the rents of an estate, apportioning those rents, so as to exhaust them, among charitable objects, any increase in the rents must be applied to the same charitable purposes. — *Beverley, Mayor of, v. The Attorney-General*, 310.

7. Where a testator gives to A. an estate or rents, in trust to make certain payments to charities, and speaks of an overplus, which he does not specifically bequeath, if there should be an increase in the profits of the estate, A. will be entitled, after making the specified payments, to take the increase. — *Id.*

8. A testator in 1652 gave an estate, which he calculated to produce 47*l.* a year, to the corporation of B., upon trust to pay certain sums, which left a residue of 7*l.* a year. He made no specific bequest of this sum, but, referring to charges which were then required for the maintenance of the army, he directed that what the mayor could not spare out of the overplus should be deducted out of the payments to some of the charitable objects of his will. These charges for the army ceased, and an increase took place in the income from the property bequeathed: —

Held, reversing the decree of the Court below, that this increase belonged to the corporation of B. — *Id.*

CHIEF CLERK, HIS CERTIFICATE. See AUCTION.

"CHILD." See WILL, 12.

COAL MINE. See RESIDUE.

COMPANY. See CONTRACT, 2. EQUITY. JOINT STOCK COMPANY.

CONSENT. See PRACTICE, 4, 5.

CONTINGENT REMAINDER. See WILL, 12, 15.

CONTRACT. See BOND, EQUITY, JOINT STOCK COMPANY, MINE.

1. A letter accepting an offer to purchase an estate on the terms stated in an advertisement, added a sum for deposit and a day for completing the purchase; no reply was given to this letter: — *Held* that there was no complete contract on which to sustain a bill for specific performance. — *Honeyman v. Marryatt*, 112.

2. *Primâ facie* all corporate bodies are bound by contracts under their common seal; but this *primâ facie* power to contract cannot be insisted on as to matters where, from the nature of the corporate body or the object of its incorporation, it is expressly or impliedly, "by reasonable inference," prohibited from contracting. A contract as to such matters is *ultra vires*. — *Shrewsbury, &c. Railway Company v. North Western Railway Company*, 113.

* 3. Where a contract between two companies proves to be one by *1033 which one of the contracting parties will gain considerable advantages, at the expense of the other, while the other will receive no corre-

- sponding benefit, whether such contract is or not legally valid, equity will not aid in enforcing it by a decree for specific performance. — *Id.*
4. A private Act of Parliament authorised one railway company to accept a lease of another railway: the directors of the first company then entered into an agreement with the directors of a third company, the stipulations of which were to be performed "during the continuance" of such lease. No lease within the provisions of the Act was ever granted. The agreement appeared to be, if legally valid, at least unfair to the shareholders of one of the companies: — *Held*, that equity would not enforce it by a decree for specific performance. — *Id.*
 5. If there is a signed paper, signed by an agent duly authorised thereto, which paper though agreeing to do something, leaves the subject matter of the agreement unexplained, but refers to another paper which contains the full particulars of the explanation, the two may be connected together, so as to constitute a contract valid under the Statute of Frauds. — *Ridgway v. Wharton*, 238.
 6. The contract so constituted by the act of A.'s duly authorised agent will be binding on A., though the second paper may have been sent by the agent to A.'s solicitor, to put it into form, provided that the agent and the person with whom he was dealing, agreed that it should be sent for that purpose; but not otherwise. The act of sending such a paper to a solicitor to have the matter reduced into form, affords generally cogent evidence that the parties do not intend to bind themselves till it is reduced into form. — *Id.*
 7. Long delay may prevent a party to an agreement from calling for specific performance of it. — *Id.*
 8. What are circumstances sufficient to establish an agent's authority, and a contract made in the exercise of it. — *Id.*
 9. There can be no remedy against a company registered under the 7 & 8 Vict. c. 110, on any contract, in which a director of the company was a party, and in which he was interested, unless the provisions of the 29th section of that statute have been strictly observed. — *Ernest v. Nicholls*, 401.
 10. A contract by the directors of one company to purchase the trade
 * 1034 of another company is not binding, unless it is authorised * by the deed of settlement of each company, and is made according to its provisions. — *Id.*
 11. Where the law has declared the construction of a contract, a Court of equity will not interfere to aid either of the parties merely on the ground of their own or their agents' dealings under it, for that would be to make a new contract, which can only be done by mutual consent, by persons properly authorised and in due form; if such dealings relate to a contract with an incorporated company, the new contract, like the old one, must be under seal. — *Midland Great Western Railway (Ir.) v. Johnson*, 798.

CORPORATION. See CHARITY, 6. EQUITY.

CORPUS OF THE ESTATE. See DEFICIENCY.

COST-BOOK PRINCIPLE. See MINE.

COSTS.

1. A testator devised lands for certain charitable purposes. The will was disputed, not on the obscurity of its terms, but on the question whether the devise was or was not void under the Mortmain Act. The costs were ordered to be paid out of the estate. — *Philpott v. St. George's Hospital*, 338.
2. In a dispute between two joint stock companies where the question was as to the power of the directors of these companies to make a contract on behalf of their respective companies each company was ordered to pay its own costs. — *Ernest v. Nicholls*, 401.
3. A rule for taxation of costs, and an *allocatur* thereon, do not amount to a "rule" or "order" within the meaning of the 1 & 2 Vict. c. 110, § 18, so as to be capable of being registered as a judgment. The rule absolute for payment of the costs does come within the enactment. — *Shaw v. Neale*, 581.
4. An indenture was executed by N. to R., at that time N.'s attorney, to secure what was then due to R., and also future advances. This indenture was made a first charge on N.'s property. S., who had previously been N.'s attorney, obtained against N. a rule absolute for payment of costs found due on the Master's *allocatur*; he registered this rule, and thus became a second encumbrancer. R. then became largely N.'s creditor for costs subsequently incurred: — *Held*, on an order allowing S. to redeem R., that these subsequent costs could not be taken into the account. — *Id.*
5. Where a judgment of the Court below was affirmed on appeal, the House (though not entirely approving of the conduct of * the * 1035 respondent) affirmed it with costs, they being a legal consequence, and not a result necessarily affected by the conduct of the parties. — *Clarke v. Hart*, 633.
6. As to when the order of the House is neither a simple affirmance nor a simple reversal of the judgment of the Court below. — See note to *Cooper v. Slade*, 798.

COVENANT. See BOND. WILL, 9, 10.

1. Where a man in his marriage settlement describes himself as entitled to an expectant estate in remainder in two pieces of land, and covenants that when "such remainder" shall become vested in possession, he will convey it to the uses of the settlement, if he should become possessed of either of these pieces of land by a title different from that described in the settlement, the covenant will not attach upon it: *Noel v. Bewley* (3 Sim. 103), doubted. — *Smith v. Osborne*, 375.
2. *Quære*. Whether, when directors have entered into a covenant which is void, their company can be liable for acts done in consequence of such covenant. — *Ernest v. Nicholls*, 401.

A lease of the Opera House contained covenants on the part of the lessee: — First: not to use the house for any but purposes of a theatrical kind, and "to use his best endeavours to improve" the house for that purpose. The house was closed at the end of the season of 1852, and was not opened at

all during the following year : — *Held*, that this was not a breach of the covenant. — *Croft v. Lumley*, 672.

Second : not to grant away, assign, dispose of, &c. the stalls or boxes "for any longer period than one year or season." On the 21st December, 1851, the lessee leased certain boxes for one year, to commence from March, 1852. On the 1st August, 1852, he made another lease of the same boxes to a different person, with this *habendum*, "from the first February now next ensuing, or from such subsequent day during the year, upon which the theatre shall be opened, and thenceforth for the full term of one year, to be computed from that day" : — *Held*, that this was not a breach of the covenant. — *Id.*

Third : "not to charge nor encumber the theatre, or the income thereof, or the terms hereby granted, by mortgaging the same, or granting any rent charges or any other encumbrance whatever." The lessee was greatly in debt. In respect of his debts he granted warrants of attorney (one of which was to secure payment of bills not then due, and another provided * 1036 that it was a concurrent security, with an indenture therein recited, * that judgment was to be entered up when the grantee thought fit, and be registered), and judgments were signed against him on those warrants of attorney, and upon Judge's orders, and registered : — *Held*, that no breach of this covenant had been committed. — *Id.*

4. A lessee tenders money in payment of rent due, and requires that it shall be accepted as rent ; the lessor refuses so to accept it, but says that he will accept it as compensation for past occupation, and (each party still continuing to assert what is his own intention on the matter) takes up the money : *Quære*, whether this amounts to a waiver of a previous right of re-entry on a forfeiture for breach of covenant ? And *Quære*, whether a waiver will operate upon breaches not known at the time ? — *Id.*

5. *Semble*, that where a clause of re-entry is "if the lessee shall make default of or in the performance of all or any of the other covenants," &c. a non-observance of negative covenants will entitle the lessor to re-enter. — *Id.*

DEFICIENCY. See *WILL*, 11, 16.

1. A testator directed his brother A. B. (whom he appointed his executor and trustee) to get in his estate and to stand possessed of the produce thereof, on trust, to raise thereout and invest in the stocks or upon mortgage such a sum of money as that, when invested, the dividends should "realize the clear annual income or sum of 200*l.*," and to pay to "my wife such dividends, interest, or annual income," &c. for her life or widowhood. On her death or second marriage, A. B. was to stand possessed "of the said principal or trust money, and the stocks upon which the same shall be invested," in trust for himself and the other brothers and sisters of the testator. And as to the residue, "after raising thereout the money sufficient to realize the annuity for my said wife," A. B. was to stand possessed thereof on similar trusts ; provided that if the testator should die leaving children, the trusts for his brothers and sisters were to be null, and the children were to take the whole. The estate when got in and invested did not produce 200*l.* a year : — *Held* (reversing the decision of the Court below), that the widow was not entitled to have

the deficiency made good out of the corpus of the estate. — *Baker v. Baker*, 616.

2. A certain portion of the fund itself had, under the order of the Court below, been sold to make good the deficiency: the House, on reversing the order, directed the widow to replace that portion. — *Id.*

* DELAY. See CONTRACT, 7.

* 1037

DEPRECIATION FUND. See EQUITY, 5.

DETAINER. See SHERIFF.

DEVISAVIT VEL NON. See PRACTICE, 2.

DEVISEE. See WILL. PRACTICE, 1.

"DIE UNDER TWENTY-ONE and WITHOUT ISSUE." See WILL, 3.

DIRECTION. See PLEADING, 2. PRACTICE, 3. SHERIFF, 5.

DIRECTORS. See CONTRACT, 2, 3, 9, 10.

Quære. Whether when directors have entered into a covenant which is void, their company can be liable for acts done in consequence of such covenant? What are the powers of directors? — *Ernest v. Nicholls*, 401.

EAT SINE DIE. See PRACTICE, 10.

ELECTIONS. See PARLIAMENT.

EQUITY. See CONTRACT, 4. PRACTICE.

1. Where a contract between two companies proves to be one by which one of the contracting parties will gain considerable advantages at the expense of the other, while the other will receive no corresponding benefit, whether such contract is or not legally valid, equity will not aid in enforcing it by a decree for specific performance. — *Shrewsbury, &c. Railway Company v. North Western Railway*, 113.
2. Long delay may prevent a party to an agreement from calling for a specific performance of it. — *Ridgway v. Wharton*, 238.
3. Mistake as to a contract is a ground for equitable relief, but it must be a mistake in fact, not in law. — *Midland Great Western Railway (Ir.) v. Johnson*, 798.
4. Mutual mistake as to its construction will not entitle either party to relief in equity. — *Id.*
5. Where the law has declared the construction of a contract, a Court of equity will not interfere to aid either of the parties merely on the ground of their own or their agents' dealing under it, for that would be to make a new contract, which can only be done by mutual consent, by persons properly authorised, and in due form. — *Id.*
6. If such dealings relate to a contract with an incorporated company, the new contract, like the old one, must be under seal. — *Id.*
7. A. entered into a contract, under seal, with an incorporated railway company to do the haulage work of the company, and to keep in repair its rolling stock. He was likewise to make new rolling stock, and out of the payments which should become due to him, a depreciation fund of five per cent. on the value of the stock as ascertained at the end of each year, * was to be formed; "and if the stock has diminished in value more *1038 than the allowed depreciation of five per cent., the contractor to pay the difference to the company; if it has increased in value, the company to pay the difference to the contractor." At law, it was held that the fund thus

formed belonged to the company. The contractor did not impeach this decision at law, but filed a cause petition in equity, claiming to have this fund allotted to him, on the ground that while the contract continued in operation, the dealings between himself and the company's chief engineer, whose decision "on all and every thing connected with the working of the contract, and the sums to be paid or deducted," was to be binding, without appeal, on both parties, had made monthly and annual calculations, in which the fund was treated as a mere guaranty fund, and had thereby induced him to go to larger expense than he should otherwise have incurred, in order to improve the rolling stock of the company: — *Held*, that these circumstances did not establish any ground for equitable relief. — *Id.*

ESTATE. See WILL.

ESTATE TAIL. See WILL, 12, 17.

EVIDENCE.

A plaintiff claimed to have been appointed to an office for life. For the purpose of proving disturbance in the office, he gave in evidence certain letters of the defendant, and a notice. In these letters and notice the office was described as being held only during pleasure: — *Held*, that though not proof of the truth of the statements contained in them, they were admissible evidence of the fact that such statements were made, and were properly left to the consideration of the jury on the question as to what had in fact been the nature of the appointment. — *M'Makon v. Leonard*, 790.

EXCHEQUER LOAN ACTS.

1. A public company was formed to erect certain works, and borrowed money for the purpose, giving mortgages to secure repayment, with interest. By several statutes the Exchequer Loan Commissioners are authorised to advance money to assist in completing public works, and to take mortgages on the works, and on the tolls, profits, &c. of such works, and priority is given to mortgages given to the commissioners over mortgages made to private individuals, except *bonâ fide* creditors who at the time of the advances by the commissioners are entitled to repayment. One of these statutes (57 Geo. 3, c. 34) provides, that where four fifths in value of the creditors shall agree in writing that a priority over
 * 1039 their claims shall be given * to the commissioners, such consent shall be binding on all the creditors. The creditors of this company entered into an agreement, by which they consented to give the commissioners' mortgage priority over their own securities "in manner following"; in the first place, that the commissioners should, out of the annual rates, &c. be paid interest; in the next, that they should then be paid interest; and lastly, that the surplus should be applied in discharge of the principal sum advanced by the commissioners until that principal sum should be repaid, in preference to all other claims: — *Held*, that an agreement giving this qualified priority to the commissioners was valid under the statute. — *South Eastern Company v. Jortin*, 425.
2. The 1 & 2 Wm. 4, c. 24, gave the commissioners, in case of default of payment, power to enter and sell. The 5 & 6 Vict. c. 9, enacted that the property sold by the commissioners should be held freed and dis-

charged from all claim and demand of the mortgagors or of persons claiming under them, in all respects, as if they were foreclosed, "provided that nothing herein contained shall prejudice the rights" of any creditors "in respect of any surplus" arising on the sale:— *Held*, that under these statutes the commissioners had a legal right to enter and sell; that after their claim for interest had been satisfied, the surplus was liable for the interest due to the other creditors; but that this liability could be enforced against the commissioners only, and not against the purchasers. — *Id.*

EXECUTED AND EXECUTORY INTEREST. See MINE, 5.

EXECUTOR. See RESIDUE.

FORFEITURE. See COVENANT, 4, 5. MINE.

FOLKESTONE HARBOUR. See JOINT STOCK COMPANY, 7, 8.

FRAUDS, STATUTE OF.

If there is a signed paper, signed by an agent duly authorised thereto, which paper, though agreeing to do something, leaves the subject matter of the agreement unexplained, but refers to another paper which contains the full particulars of the explanation, the two may be connected together, so as to constitute a contract valid under the Statute of Frauds. — *Ridgway v. Wharton*, 238.

GENERAL RULES AND ORDERS.

General Rules and Orders of July, 1851 (Ch.), p. 556. Nos. 49, 51, of October, 1852 (Ch.), p. 556. No. 69 of 1853 (Com. Law), p. 798, n.

GUARANTY FUND. See EQUITY, 7.

* "GROVE DESERT." See MINE.

* 1040

"HEIRS OF THE BODY." See WILL, 13.

HUSBAND AND WIFE. See PRACTICE, 6, 7.

"INCREASE." See CHARITY.

INTEREST. See PRACTICE, 10.

"ISSUE." See WILL, 9, 10.

INFLUENCE, UNDUE. See WILL.

JOINT STOCK COMPANY. See CONTRACT. EQUITY PRACTICE, 8.

1. The Irish Statute 33 Geo. 2, c. 14, is repealed, so far as joint stock banks in Ireland are concerned, by the imperial Statute 6 Geo. 4, c. 42, though the former is not mentioned in the latter statute, the provisions of the two statutes being entirely incompatible with each other. — *O'Flaherty v. M'Dowell*, 142.
2. A joint stock banking company in Ireland is within the provisions of the 8 & 9 Vict. c. 98. — *Id.*
3. There can be no remedy against a company registered under the 7 & 8 Vict. c. 110, on any contract, in which a director of the company was a party, and in which he was interested, unless the provisions of the 29th section of that statute have been strictly observed. — *Ernest v. Nicholls*, 401.
4. A contract by the directors of one company to purchase the trade of another company is not binding, unless it is authorised by the deed of settlement of each company, and is made according to its provisions. — *Id.*
5. *Quære*. Whether, when directors have entered into a covenant which is

void, their company can be liable for acts done in consequence of such covenant? what are the powers of directors? — *Id.*

6. Circumstances under which each company was directed to pay its own costs. — *Id.*

7. A public company was formed to erect certain works, and borrowed money for the purpose, giving mortgages to secure repayment, with interest. By several statutes the Exchequer Loan Commissioners are authorised to advance money to assist in completing public works, and to take mortgages on the works, and on the tolls, profits, &c. of such works, and priority is given to mortgages given to the commissioners over mortgages made to private individuals, except *bonâ fide* creditors who at the time of the advances by the commissioners are entitled to repayment. One of these statutes (57 Geo. 3, c. 84) provides, that where four fifths in value of the creditors shall agree in writing that a priority over their claims

* 1041 shall be given to the commissioners, such consent shall * be binding on all the creditors. The creditors of this company entered into an agreement, by which they consented to give the commissioners' mortgage priority over their own securities "in manner following": in the first place, that the commissioners should, out of the annual rates, &c. be paid interest; in the next, that they should then be paid interest; and, lastly, that the surplus should be applied in discharge of the principal sum advanced by the commissioners until that principal sum should be repaid, in preference to all other claims: — *Held*, that the agreement giving this unqualified priority to the commissioners was valid under the statute. — *South Eastern Railway Company v. Jortin*, 425.

8. The 1 & 2 Wm. 4, c. 24, gave the commissioners, in case of default of payment, power to enter and sell. The 5 & 6 Vict. c. 9, enacted that the property sold by the commissioners should be held freed and discharged from all claim and demand of the mortgagors or of persons claiming under them, in all respects, as if they were foreclosed, "provided that nothing herein contained shall prejudice the rights" of any creditors "in respect of any surplus" arising on the sale: — *Held*, that under these statutes the commissioners had a legal right to enter and sell; that after their claim for interest had been satisfied, the surplus was liable for the interest due to the other creditors; but that this liability could be enforced against the commissioners only, and not against the purchasers. — *Id.*

JUDGMENT, ENTRY OF. See PRACTICE, 9.

JUDGMENT. See PRACTICE, REGISTRATION.

A lessee covenanted "Not to charge nor encumber the theatre, or the income thereof, or the terms hereby granted, by mortgaging the same or granting any rent charges or any other encumbrance whatever." The lessee was greatly in debt. In respect of his debts he granted warrants of attorney, and judgments were signed against him on those warrants of attorney, and upon Judge's orders: — *Held*, that no breach of this covenant had been committed. — *Croft v. Lumley*, 672.

LAND, CHARGE ON. See TRUST, WILL.

LEASE. See CHARITY, CONTRACT, COVENANT.

LEGACIES. See WILL, 11, 16 18.

LIEN. See ATTORNEY.

LIMITATIONS, STATUTE OF. See BOND. CHARITY. CONTRACT, 7.
TRUSTS AND TRUSTEES. WILL.

Charities are trusts, and are as such within the operation of the * 3 * 1042 & 4 Will. 4, c. 27. — *St. Mary Magdalen College v. The Attorney-General*, 189.

The first section of the statute extends the word "person" to a class of persons as well as to individuals. The poor of a parish are a class of persons within the meaning of that section. — *Id.*

Where the Attorney-General having no independent rights of his own, stands only in the same situation as those who are entitled to the benefit of a charity, if they would be barred by lapse of time, he is equally barred. — *Id.*

MARRIED WOMAN. See PRACTICE, 4, 5, 6, 7.

MASTER, THE. See ATTORNEY, 3. PRACTICE, 9.

MINE.

1. Power in coadventurers to forfeit the shares of one of their number for nonpayment of calls is not necessarily incident to a mining adventure conducted on the cost-book principle. — *Clarke v. Hart*, 633.

2. Where such a power exists by agreement between the parties, it is to be treated as *strictissimi juris*, like a power of forfeiture with respect to an estate, and the forms to be observed in declaring the forfeiture must be strictly followed. — *Id.*

3. Where an agreement to work mines on the cost-book principle has been entered into by several persons, the written statement of one of them (made subsequently to the date of the agreement), that his shares are liable to forfeiture on nonpayment of calls, will not affect his rights under the agreement. — *Id.*

4. A. B. and C., in November, 1848, entered into an agreement to work mines on the cost-book principle. A. did not pay up his calls. In a letter of November, 1849, to his coadventurers, he spoke of his shares as liable to forfeiture. He received a notice of a meeting of the coadventurers, to be held on the 3d May, 1850, to declare his shares forfeited. He denied the right to forfeit them. The meeting was held, but instead of declaring A.'s shares forfeited, the coadventurers passed a resolution to give him time to the 15th May, after which it was declared that if the calls were not paid up, the shares would be treated as forfeited. The calls were not paid on the day named, and a letter was afterwards written, stating that the shares had been forfeited on the 31st May: — *Held*, that even if there had been a right of forfeiture necessarily incident to work a mine on the cost-book principle, the proper steps to exercise that right had not been taken, and that the shares were not forfeited: — *Held* also, that what was done on the 31st May, 1850, did not operate as a dissolution of the partnership. — *Id.*

* 5. A. had, in his letter of November, 1849, stated that his shares * 1043 were liable to forfeiture: he repeatedly afterwards denied the existence of such liability. In May, 1850, they were declared forfeited. A further correspondence ensued, in the course of which he said he should

wait to enforce his rights till the profits of the mines would pay the law charges. In August, 1853, he filed his bill:—*Held*, that these circumstances did not disentitle him to relief in equity, the matter in which he sought relief being one which related to an executed and not an executory interest. — *Id.*

Held also, that the judgment of the Court below being affirmed, ought to be affirmed with costs, they being a legal consequence, not a result necessarily affected by the conduct of the parties. — *Id.*

(*Pickard v. Sears*, 6 A. & E. 469, and *Freeman v. Cooke*, 2 Exch. 654, commented on.)

MISDIRECTION. See PLEADING, 2. PRACTICE, 3. SHERIFF, 5.

MISJOINDER. See PLEADING, 2.

MORTGAGEES. See EXCHEQUER LOAN ACT, REGISTRATION.

MORTMAIN ACT.

1. The 9 Geo. 2, c. 36 (the Mortmain Act), is a prohibitory, not a penal statute. — *Philpott v. St. George's Hospital*, 338.

2. Prohibitory statutes must not be interpreted on a principle of tendency: if any thing done is substantially that which is prohibited, the thing done is void, not because of its tendency, but because it is within the true construction of the statute the thing prohibited. — *Id.*

3. B. devised to S. a piece of land in N.; B. then declared his desire to erect and endow almshouses in N., and he empowered his trustees "so soon as land in N. shall have been legally dedicated to charitable uses" by some other person, within twelve months after his decease, to pay to the trustees of the intended charity a sum of 60,000*l.*, to be devoted to the purposes of the charity, but not to be applied to the purchase of lands for the same: — *Held*, reversing the judgment of the Court below, that this bequest was not void under the Mortmain Act. — *Id.*

NEGATIVE COVENANT. See COVENANT, 5.

OATH.

By the Statute 4 Anne, c. 14 (Ir), the person appointed to the office of weighmaster in the market of a town, was required to take certain oaths

* 1044 provided by the Statute 3 W. & M. c. 2. * These could not be taken by a Roman Catholic. This office is taken to be included in "all offices and franchises" mentioned 10 Geo. 4, c. 7, § 21, and therefore the oath prescribed by that statute is to be taken in substitution for the oaths prescribed by the earlier statutes. But this oath must be taken in reference to the appointment to the office, and the having taken it as a barrister previous to such appointment does not relieve the appointee from the necessity of proving that he took it before entering upon his office. — *M'Mahon v. Lennard*, 970.

OFFICE. See EVIDENCE. OATH. PLEADING, 2. WEIGHMASTER.

"OR." See WILL, 3.

OPENING BIDDINGS. See AUCTION.

"OTHER." See WILL, 9, 10.

OUTVOTER. See PARLIAMENT.

"OVERPLUS." See CHARITY.

PARLIAMENT.

1. The 17 & 18 Vict. c. 102, § 2, declares guilty of bribery "every person who shall, directly or indirectly, by himself or by any other person, give or agree to give, or promise money, &c. to any voter, in order to induce any voter to vote, or refrain from voting, &c., or shall corruptly do any such act as aforesaid, on account of any voter having voted or refrained from voting," &c., provided that this shall not extend to money paid on account of legal expenses *bonâ fide* incurred. — *Cooper v. Slade*, 746.

An election was about to take place at C. S. was one of the candidates. In the committee room of S. the question was discussed whether paying the expense of bringing up outvoters was legal. S., after referring to a law book, said that it was, but limited it to the payment of expenses out of pocket. A circular had been previously prepared and printed requesting out-voters to come up and vote for S. Upon S. making this declaration of his opinion, a clerk to an agent of S. (without any express direction from S. or from the agent) wrote at the bottom of each circular, "Your railway expenses will be paid." A voter who resided at H. received one of these circulars with this added note; he came to C. and voted for S., and afterwards received the sum of 8s., the expenses to which he had *bonâ fide* been put by his journey: — *Held*, that the whole circular must be treated as written by the authority of S., that the payment was forbidden by the *17 & 18 Vict. c. 102, § 2, *1045 and that for the purposes of that statute the payment must be treated as "corruptly" made. — *Id.*

2. A letter was written to an out-voter requesting him to come to a borough, and record his vote for S. A postscript added, "Your railway expenses will be paid." The voter did come and vote as requested: his travelling expenses were paid: — *Held*, that the promise and payment constituted only one act of bribery within § 2, of 17 & 18 Vict. c. 102, and that consequently two counts, one for the promise to pay, and one for the actual payment, could not be supported. — *Id.*

PARTNERSHIP. See MINE, 4.

"PARTY" TO THE PROCEEDINGS. See AUCTION.

PENAL AND PROHIBITORY STATUTES. See MORTMAIN ACT.

"PERSON." See CHARITY, 3.

PLEADING. See JOINT STOCK COMPANY. LIMITATIONS, STATUTE OF. PRACTICE. PARLIAMENT, 2.

1. A petition of certain persons under the 33 Geo. 2, c. 14 (Ir.), on behalf of themselves and all the creditors of an Irish bank, for administration of assets, under the trusts of that statute, is informal. It ought to be, in any case where it can be maintained, a petition on behalf of all the creditors of the persons constituting the bank, the provisions of that statute affording a remedy not exclusively for debts owed by those persons in respect of the bank, but for their debts generally. — *O'Flaherty v. M'Dowell*, 142.
2. A declaration for disturbance in an office contained three counts. The first and third were in case; the second, after reciting the title of the plaintiff to the office, alleged that the defendants broke and entered his dwelling-house, and seized and took the beams and scales, &c., and other-

wise hindered him from exercising his said office:— *Held*, that this was not a misjoinder. — *M^r Mahon v. Lennard*, 970.

PRACTICE. See COSTS. REDEEM, ORDER TO.

1. A bill to establish a will against an heir at law may be maintained at the suit of a mere legal devisee not charged with any duty or trust under the will. — *Colclough v. Boyse*, 1.
2. In a bill filed by an heir at law to impeach a will of real estate as having been obtained by undue influence or fraud, the Court of Chancery has a discretion to direct an issue *devisavit vel non*, or merely to
 *1046 remove obstacles out of the way of *the heir asserting his legal title. This House will not interfere with the exercise of that discretion, unless it appears that injustice has been or is likely to be its consequence. — *Boyse v. Rossborough*, 2.
3. Whether in a trial at law ordered by the Court of Equity, there has or has not been misdirection, equity is not bound by one verdict, but for its better satisfaction may direct a new trial. — *Id.*
4. *Quære*. Whether a consent to a particular form of order can be given by a married woman? — *Id.*
5. Though during her husband's life and after his death she acted upon that order, she was allowed to make it one of the grounds of appeal to this House. — *Id.*
6. A suit was instituted against a married woman and her husband in respect of property devised to her. After a decree, which among other things directed an account, the Master reported a sum as due from both. An order was made on the widow to pay this sum into Court within a limited time. This sum was composed of rents received from the property in dispute before, and during, the marriage, and after the death of the husband. — *Id.*
7. *Quære*. Whether such an order could be, under such circumstances, valid? — *Id.*
8. A petition of certain persons under the 33 Geo. 2, c. 14 (Ir.), on behalf of themselves and all the creditors of an Irish bank, for administration of assets, under the trusts of that statute, is informal. — *O'Flaherty v. M^r Dowell*, 142.
 (Fawcett v. Hodges, 3 Ir. Eq. Rep. 232, overruled; Hayden v. Carroll, 3 Ridg. Parl. Cas. 545, questioned. — *Id.*)
9. A disallowance of the Master of a claim made under the Winding-up Acts is the subject of an appeal. — *Ernest v. Nicholls*, 401.
10. A declaration contained two breaches. The defendant pleaded not guilty on the first breach, which involved the whole cause of action. The finding was for the plaintiff, and the damages were assessed thereon, and judgment was entered up on that finding. On the second breach there was a finding of not guilty. No entry of *eat sine die* was made on this finding: — *Held*, that there should have been such an entry; but that this House had power to amend the record, by directing such an entry to be made. — *Hooper v. Lane*, 443.
11. *Quære*. Whether where a judgment of the Court below is affirmed
 *1047 on error, and interest is asked for under the 3 & 4 Wm. 4, *c. 42, this

House need make the order for interest, or may leave the party to apply for it in the Court below. — *Id.*

12. In a case in which the question arose under a will whether a deficiency of a sum to realize an income was to be made good out of the corpus of the estate, a portion of the fund itself had, under the order of the Court below, been sold to make good the deficiency; the House on reversing the order, directed the widow to replace that portion. — *Baker v. Baker*, 616.
13. Certain parties held different characters, and a suit was instituted against them, not quite in regular form, but they were all before the Court; an order had been made, directing an inquiry and report, and the inquiry had taken place, and the report had been made; and the report was confirmed on further directions. An appeal was then brought: — *Held*, that a Court of equity, seeing that all the parties really interested were before it, would not, especially after an inquiry and report, dismiss the bill for matter of form. — *Burrowes v. Gore*, 907.

PRIORITY. See EXCHEQUER LOAN ACTS, JUDGMENT.

PRIVATE CONTRACT. See AUCTION.

PROHIBITORY ACTS. See MORTMAIN.

PURCHASER. See AUCTION, 5.

RECOVERY. See WILL.

REDEEM, ORDER TO.

An indenture was executed by N. to R., at that time N.'s attorney, to secure what was then due to R., and also future advances. This indenture was made a first charge on N.'s property. S., who had previously been N.'s attorney, obtained against N. a rule absolute for payment of costs found due on the Master's *allocatur*; he registered this rule, and thus became a second encumbrancer. R. then became largely N.'s creditor for costs subsequently incurred: — *Held*, on an order allowing S. to redeem R., that these subsequent costs could not be taken into the account. — *Shaw v. Neale*, 581.

RE-ENTRY. See COVENANT.

REGISTRATION. See COSTS, JUDGMENT.

Under the 2 & 3 Vict. c. 11, if A. has a judgment registered under the 1 & 2 Vict. c. 110, such registration will protect him against all who become mortgagees or purchasers during the currency of the five years, and such protection will continue * as to them under a re-registra- * 1048 tion, even though he should have omitted to re-register within five years; but as to persons becoming mortgagees or purchasers between the period when his first registration ceased and when his re-registration began, he will not be protected, but they will have priority over him. (*Beavan v. Lord Oxford*, 6 De G., M. & G. 492, approved). — *Shaw v. Neale*, 581.

REMOTENESS. See WILL, 17.

RESIDUE.

1. A person having a charge for life on residue, has, to the extent of that charge, the rights of a residuary legatee, and is entitled to have the residue ascertained and secured within, if possible, one year after the death

of the testator. It is the duty of the executor to do all in his power to effect that object. — *Wightwick v. Lord*, 217.

2. In a case in which the will gave no specific directions as to the payment of debts, the executor, who was also the ultimate residuary legatee, having taken on himself (after the trustees named in the will had renounced), to administer the estate, did not ascertain and secure the residue at the end of the year, but worked part of the property (a coal mine) to a profit for several years, when it ceased to be of any value. On a bill, at the suit of the person having the charge on the residue, praying that the will might be established and accounts taken: — *Held* (affirming a decretal order of the Lords Justices), that the executor was not, after assuming to act as a trustee, entitled to postpone the sale of the property to the prejudice of the person having the charge on the residue; that, having postponed it, he was chargeable with the value of the mine at the end of a year from the testator's death, with interest thereon, and that the value must be calculated as constituted of the aggregate of the annual profits derived from the mine in all the subsequent years, till it became unproductive, such annual profits to be treated as deferred payments. — *Id.*

RULE. See COSTS, 3.

SALE. See AUCTION, CHARITIES.

1. The presumption in a gift of land for charitable purposes, is that they are devoted "for ever" to the purposes of the charity, and that no authority to sell them is intended; but a sale of such lands at a distant date with long acquiescence in such sale, and no account of the origin of the charity, may give rise to a presumption that there had been a power enabling * 1049 the holders of the charity lands to sell them, and that the sale was made under that power. — *St. Mary Magdalen v. The Attorney-General*, 189.
2. *Quære*. Whether under an order of the Court of Chancery a sale by auction and a sale on sealed tenders can be considered identical? — *Barlow v. Osborne*, 556.
3. On a sale of property (under an order of the Court of Chancery) by private contract, the practice of opening biddings is inapplicable. — *Id.*

SETTLEMENT. See BOND, COVENANT.

SHARE. See MINE.

SHERIFF.

1. Although the sheriff is an agent for those who put writs into his hands to execute, he is also a public functionary, having, at the same time, duties to perform towards those against whom such writs are directed. — *Hooper v. Lane*, 443.
2. If the sheriff having two writs in his hands, one valid, the other invalid, arrests on both at the same time, he may rely on the valid writ, and treat as detainees any number of valid writs which he may then have, or which may afterwards come to his hands. — *Id.*
3. But if, having two such writs, he arrests on the invalid writ alone, he cannot afterwards justify the arrest by the good writ. — *Id.*
4. Nor can he while a person is unlawfully in his custody, by virtue of an arrest on an invalid writ, arrest that person on a good writ. To permit

him to do so would be to allow him to take advantage of his own wrong.
— *Id.*

5. H., a sheriff, had in his office a valid writ against B., at the suit of one L., but had not himself granted any warrant upon it. H. had also in his hands a writ against B., at the suit of A., which was invalid for want of signature by the proper officer of the Exchequer, the Court out of which it issued. H. had granted a warrant on this writ, and H.'s bailiff arrested B. upon it. B. went before a Judge, claiming to be discharged. The bailiff opposed this application, and, having obtained a warrant on L.'s writ, also claimed to detain B. on that writ. The Judge discharged B., who then left the country. In an action by L. against H. for neglect, the Judge told the jury that it was a question of fact whether H. had been guilty of culpable neglect in arresting upon A.'s invalid writ; and that if H. knew, or by reasonable care might have discovered, that * A.'s writ was void, it was culpable negligence: — *Held*, affirming * 1050 the judgment of the Court below, that this direction was right. — *Hooper v. Lane*, 443.

SOLICITOR. See ATTORNEY.

STATUTE.

1. An affirmative statute, giving a new right, does not of itself and necessarily destroy a previously existing right, created by another statute to which it does not refer; but will do so, if it appears to have been the intention of the Legislature that the two rights should not exist together. — *O'Flaherty v. McDowell*, 142.
2. The Irish Statute 33 Geo. 2, c. 14, is repealed, so far as joint stock banks in Ireland are concerned, by the Imperial Statute 6 Geo. 4, c. 42, though the former is not mentioned in the latter statute, the provisions of the two statutes being entirely incompatible with each other. — *Id.*

STATUTES.

- 1 Hen. 4, c. 13. 970.
- 4 Hen. 4, c. 20. 970.
- 3 Hen. 7, c. 10. 798, n.
- 10 Hen. 7, c. 22. 970.
- 3 W & M. c. 2. 970.
- 4 Anne, c. 14 (Ir.). 970.
- 25 Geo. 2, c. 15 (Ir.). 970.
- 33 Geo. 2, c. 14 (Ir.). 142.
- 27 Geo. 3, c. 41 (Ir.). 970.
- 47 Geo. 3, c. 2. 425.
- 57 Geo. 3, c. 34. 425.
- 10 Geo. 4, c. 7. 970.
- 1 & 2 Wm. 4, c. 26. 425.
- 3 & 4 Wm. 4, c. 27. 189, 909.
- 2 & 3 Vict. c. 11. 581.
- 5 & 6 Vict. c. 9. 425.
- 7 & 8 Vict. c. 110. 401, 581.
- 8 & 9 Vict. c. 98. 142.

15 & 16 Vict. c. 80. 556.

17 & 18 Vict. c. 102. 747.

"SUCH ISSUE." See WILL, 9, 10.

"SURVIVING ISSUE." See WILL, 9, 10.

TENDER.

A lessee tenders money in payment of rent due, and requires that it
 * 1051 shall be accepted as rent; the lessor refuses so to accept * it, but says that he will accept it as compensation for past occupation, and (each party still continuing to assert what is his own intention on the matter) takes up the money. *Quære*, whether this amounts to a waiver of a previous right of re-entry on a forfeiture for breach of covenant. — *Croft v. Lumley*, 672.

TERM. See BOND, WILL, 17.

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A lease of the Opera House contained a covenant on the part of the lessee not to use the house for any but purposes of a theatrical kind, and "to use his best endeavours to improve" the house for that purpose. The house was closed at the end of the season of 1852, and was not opened at all during the following year: — *Held*, that this was not a breach of the covenant, for that the covenant referred to improvements in the house itself, and did not bind the lessee to keep it open at a loss. — *Croft v. Lumley*, 672.

TRUSTS AND TRUSTEES. See BOND, CHARITIES, WILL.

1. Charities are trusts, and are, as such, within the operation of the 3 & 4 Wm. 4, c. 27. — *St. Mary Magdalen v. The Attorney-General*, 189.
2. The first section of the statute extends the word "person" to a class of persons as well as to individuals. The poor of a parish are a class of persons within the meaning of that section. — *Id.*
3. Where the Attorney-General having no independent rights of his own stands only in the same situation as those who are entitled to the benefit of a charity, if they would be barred by lapse of time, he is equally barred. — *Id.*
4. Lands were given for the benefit of the poor of two parishes, and were placed under the management of the rectors and church-wardens, who, with the consent of the vestries, might lease them. The rectors, &c. executed a lease of them for ever to the president and scholars of a college subject to a fixed rent charge. Above sixty years after the execution of this lease (the fairness of which at the time of its execution was not impeached), the Attorney-General filed an information against the lessees, praying that it might be cancelled: — *Held*, that the real plaintiffs in this suit were the poor of the two parishes; that they were in the situation of a *cestuis que trust*, that the suit by information of the Attorney-General (who had no independent rights), was a suit by them; that they could
 * 1052 not maintain such suit (unless against their trustees), except * within twenty years; that this was not such a suit, but was a suit against purchasers for value, and therefore that it was barred. — *St. Mary Magdalen v. The Attorney-General*, 189.
5. An express trust of a charge upon land is, by the true construction of the

Statute of Limitations, 3 & 4 Wm. 4, c. 27, as much saved from its operation as an express trust of the land itself. — *Burrowes v. Gore*, 907.

UNDUE INFLUENCE. See WILL.

WAIVER. See COVENANT, TENDER.

WEIGHMASTER IN A MARKET. See OATH, PLEADING, EVIDENCE.

1. The office of weighmaster in a market town in Ireland is a freehold office. The appointment to it ought to be for life. — *M'Mahon v. Leonard*, 970.
2. It is not necessary, in an action by the weighmaster for disturbance in his office, to show a formal appointment to it by deed. His having acted in the office for several years is sufficient. — *Id.*
3. The office of weighmaster, mentioned in the Act 4 Anne, c. 14, is not the same as that of weigher, mentioned in the Acts of 1 Hen. 4, c. 13, and 4 Hen. 4, c. 20 (introduced into Ireland by the 10 Hen. 7, c. 22). The Statute of Anne refers only to a weighmaster appointed to regulate the dealings between individuals in an open market; the Statutes of Hen. 4, apply to weighers of goods appointed to take customs thereon for the Crown, and therefore the provisions of the Statutes of Hen. 4, that such office should not be for life, but only for pleasure, did not apply to the weighmaster under the Statute of Anne. — *Id.*

WIFE. See PRACTICE, 4, 5, 6, 7.

WILL. See CHARITY, COSTS, DEFICIENCY, PRACTICE, RESIDUE.

1. Undue influence may exist in the form of bad companionship and bad example, and yet not be sufficient to invalidate a will made under its operation. To be within the meaning of the rule of law, so as to produce that effect, it must be an influence exercised by coercion or by fraud. But actual violence is not necessary to constitute coercion. Imaginary terrors may be sufficient for that purpose. — *Boyse v. Rossborough*, 2.
2. In order to set aside a will of a person of sound mind, it must * be * 1053 shown that the circumstances under which it was executed are inconsistent with any hypothesis but that of undue influence, which cannot be presumed, but must be shown to have been exercised, and exercised in relation to the will itself, and not merely to other transactions. — *Id.*
3. A testator who was possessed of two estates, S. and H., devised them to trustees, to pay debts, legacies, and annuities, "and subject to the trusts aforesaid, all the said premises hereinbefore devised shall be in trust for my grandson Robert W. and the heirs of his body; but in case he shall die under the age of twenty-one years, and without issue, my estate at H. (subject to the trusts hereinbefore respectively declared) shall be in trust for my granddaughter Ann W. and the heirs of her body; but in case she shall die under the age of twenty-one years, and without issue, the last-mentioned premises shall be upon such and the same trusts as are hereinafter declared concerning my estate at S. And I declare and direct, that if my said grandson, Robert W., shall die under the age of twenty-one and without issue," the trustees were to stand seised of S. on trust, to pay the rents and profits to the use of the testator's son Richard W., and his wife, for life, "and subject to the trusts hereinbefore

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thereof declared, the estate at S. shall be in trust for " the family of D. in fee. The trustees were to raise during the minority of Robert and Ann money for their maintenance. The grandson Robert W. attained twenty-one, but died without issue; the granddaughter Ann W. also attained twenty-one, but died without issue: — *Held* (Lord St. Leonards *dissentiente*). First. The words must be read in their ordinary sense as written. The first limitation over depended on the double event of Robert dying under twenty-one, and without issue, which not having happened, the limitation over did not take effect, but the estates descended to Richard, the son and heir at law of the testator, and through him to Robert, as his heir at law. — *Grey v. Pearson*, 61.

4. Secondly. On Robert attaining twenty-one, the equitable remainder in fee of the S. estate, limited to the D. family, took effect in possession; but the ultimate limitation to that family only operated on the S., but not on the H. estate. — *Id.*

5. Per LORD ST. LEONARDS. — First. The testator did not intend to die intestate as to either of his estates. A change might be made in the words of the will to give effect to his real intention. The first gift was in tail:

* 1054 the limitation over depended on * Robert dying without issue, and was perfectly good as a remainder. — *Id.*

6. Secondly. The remainder in fee to the D. family did not depend on the previous contingencies taking effect; but was an ultimate devise of all the testator's remaining interest in the estates, so as wholly to exclude his heir at law. — *Id.*

7. B. devised to S. a piece of land in N.; B. then declared his desire to erect and endow almshouses in N., and he empowered his trustees "so soon as land in N. shall have been legally dedicated to charitable uses" by some other person within twelve months after his decease, to pay to the trustees of the intended charity a sum of 60,000*l.*, to be devoted to the purposes of the charity, but not to be applied to the purchase of lands for the same: — *Held*, reversing the decision of the Master of the Rolls, that this bequest was not void under the Mortmain Act. — *Philpott v. St. George's Hospital*, 338.

8. As there was no question of construction occasioned by the obscurity of the will itself, the costs were ordered to come out of the fund bequeathed. — *Id.*

9. Where there is, in a will, a gift to two designated devisees, as tenants in common in tail, and if either should die without issue, then to the "surviving" devisee, that word must be taken to mean "other." — *Smith v. Osborne*, 375.

10. O., in anticipation of marriage, executed a settlement, which recited, that "whereas O. is entitled to a contingent remainder on failure of the issue of G. C., party hereto, in the town and lands of S., and in certain tenements in W., subject only to such powers over the same as shall appear to be vested in G. C., under and by virtue of the last will of T. C.," and it went on to covenant, that when and so soon as "the said remainder" should become vested in O. in possession, he would then convey the property to the uses of the settlement. By the will of T. C., both these

properties were devised to G. C. for life, remainder to his first and other sons in tail, remainder to the testator's daughters, Elizabeth and Frances, as tenants in common in tail, and if either daughter should die without issue, then to the use of my surviving daughter and the heirs of her body lawfully issuing and in default of such issue, to my own right heirs." G. C. died unmarried, and the lands of S. and W. descended to the two daughters, one of whom was O.'s mother, as tenants in common. The two sisters executed * disentailing deeds as to S., but * (55) not as to W., and soon afterwards O.'s mother died intestate, and her property descended to O., her son, the covenantor. The other sister by will gave all her property to O., her nephew, subject to certain annuities and legacies: — *He C.* that as to the lands at S., the entail of which had been barred, and which had not descended to O. under the will of T. C., this covenant did not take effect; but it did take effect as to the lands at W., for the word "surviving" in the will of T. C. must be construed to mean "other," and the words "such issue" include the issue of both daughters, and therefore O. succeeded to both moieties of that estate as tenant in tail under the will. — *Id.*

11. A testator directed his brother A. B. (whom he appointed his executor and trustee) to get in his estate and to stand possessed of the produce thereof on trust, to raise thereout and invest in the stocks or upon mortgage such a sum of money as that, when invested, the dividends should "realize the clear annual income or sum of 200*l.*" and to pay to "my wife such dividends, interest, or annual income," &c. for her life or widowhood. On her death, or second marriage, A. B. was to stand possessed of "the said principal or trust money, and the stocks upon which the same shall be invested," in trust for himself and the other brothers and sisters of the testator. And as to the residue, "after raising thereout the money sufficient to realize the annuity for my said wife," A. B. was to stand possessed thereof on similar trusts; provided that if the testator should die leaving children, the trusts for his brothers and sisters were to be null, and the children were to take the whole. The estate when got in and invested did not produce 200*l.* a year: — *Hed* (reversing the decision of the Court below), that the widow was not entitled to have the deficiency made good out of the corpus of the estate. — *Baker v. Baker*, 6:6.

12. Devise (in 1517) of a freehold estate for lives renewable for ever, "to my son W. during his life, and after his death to his lawful issue, in such manner, shares, and proportions as we by deed or will shall appoint, and for want of such appointment, then to his issue equally, if more than one; and, if only one child to said child; and in failure of issue of W." to J. Another estate, consisting of freehold lands, was devised in the same terms to another son J.; and on failure of * the issue of J., it was to * 1056 go to W. J. and W. before the birth of any child to W. (J. himself never married), joined in a recovery as to the lands devised to J., and to which W. afterwards succeeded in possession on J.'s death without issue. W. died leaving four children: he had not executed any appointment, but during his life disposed of *some* descriptions of lands to creditors for

value: — *Held*, that under these devises each of the first devisees took an estate tail by implication. — *Roddy v. Fitzgerald*, 823.

13. Where in a devise there is a gift over on general failure of "issue," it is presumed that the word "issue" has been used by the testator as meaning "heirs of the body." — *Id.*
 14. When the word "issue" is so employed, it is for the party seeking to give it a meaning other than that which it frequently bears, to show clearly from the context of the will that the testator intended to give it a different meaning. — *Id.*
 15. The remainders here were contingent, and therefore the recovery suffered as to the fee-simple lands operated as a bar to them whether the first devisee did or did not take an estate tail. — *Id.*
 16. A testatrix devised all her real and personal estate to A. and B., to get in and sell the same on trust, to pay debts, and then to discharge "the following legacies," naming two. "I also give and bequeath to T. 2000*l.* (in which sum, or thereabouts, he now stands indebted to me) subject to, and I charge the same with the payment of the following life annuities and sums of money; (that is to say)" — She then gave to her sister 40*l.* to her sister's husband, W. L., if he survived his wife, 20*l.*, and to her sister, M. P., 20*l.*, which annuities were to be paid, when they became due, by T.; the first payments to the two sisters at the end of six months after the death of the testatrix; and to W. L. at the end of six months after the death of his wife. The testatrix then gave four legacies of 50*l.* each to nephews and nieces; 40*l.* to the only child of a nephew, and 50*l.* between the two children of a deceased nephew, and directed these legacies to be paid within twelve months after the death of her sister, M. P., and to be paid by T. Then followed a proviso, that she did not intend the legacy of 2000*l.* to T. to exonerate him from the debt due to herself, but whatever should be due at her decease was to be taken in part or in satisfaction (as the case might be) of the legacy; and then came a general direction
- *1057 that "the several * and respective legacies hereinbefore bequeathed" should be paid to the respective legatees within twelve calendar months after her decease, or so soon afterwards as her real and personal estates could be collected and converted into money. There was also a direction that the legacies payable to the children of the nephews should be vested interests in them at twenty-one, and in the mean time the money should be invested by the trustees for the benefit of the children. T. never paid any part of the debt, and became utterly insolvent: — *Held* (Lord Wensleydale *diss.*), affirming the decree of the Court below, that the annuities and legacies charged on that debt were intended to be payable if the particular fund (the debt) failed, out of the general assets. — *Vickers v. Pound*, 885.
17. A testator gave certain leaseholds to trustees for a term of thirty years, to receive rents and profits, and pay debts and legacies, to accumulate the rents, &c.; to permit his son Benjamin to take the rents for his own use "until the son of my son Benjamin (if he shall have a son) shall attain twenty-one; and then I give and bequeath the premises to trustees, to preserve contingent remainders, but to permit such son to receive the

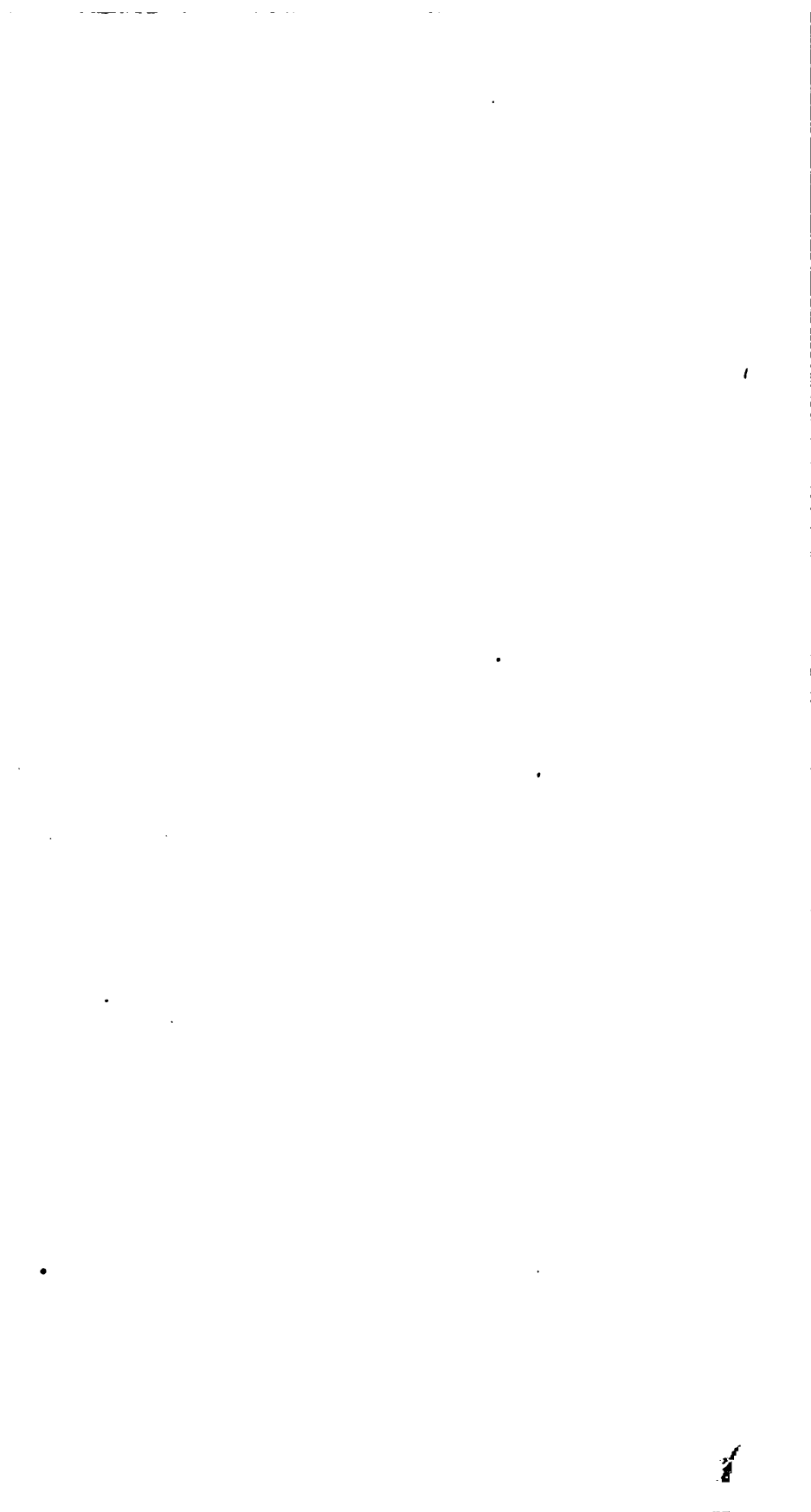
rents and profits for his natural life, and after his decease to the heirs male of such son and the heirs male of their bodies: and for default of such issue, I give the premises to the trustees to permit my son Lewis," and then followed the same provisions with respect to Lewis as those which had been previously made with respect to Benjamin, and in default, &c. the premises were again given to trustees to preserve remainders, and then came a repetition of the former provisions in favour of "the son of my daughter Abigail." Benjamin and Lewis successively entered into possession of the leaseholds, and died without male issue; Abigail had a son, who attained twenty-one: — *Held*, that the devise over after Benjamin was not void for remoteness, but that Abigail's son took an estate tail, the rule as to freeholds being in this case properly applicable to leasehold estates. — *Williams v. Lewis*, 1018.

18. *Held* also, that the direction to accumulate in respect of the term of thirty years was not void, for the legacies payable by the will were only legacies given to persons then in being. — *Id.*

WINDING-UP ACTS. See **COMPANY.**

A disallowance by the Master of a claim made under the Winding-up Acts is the subject of an appeal. — *Ernest v. Nicholls*, 401.

END OF VOL. VI.





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